(7)

No. 83-2032-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Bernardo Rios-Pineda and Estarnilada Rios-Pineda De Rios

Docketed:
June 11, 1984

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: de la Campa,Roman, Rudnick,Lawrence H.

Entry	Date	Note	Proceedings and Orders
1	Mar 30 1984		Application for extension of time to file petition and order granting same until June 11, 1984 (Blackmun, April 4, 1984).
2	Jun 11 1984	G	Petition for writ of certiorari filed.
3	Jul 18 1984		DISTRIBUTED. September 24, 1984
4	Sep 4 1984	P	Response requested. (Due October 4, 1984 - NONE RECEIVED)
6	Sep 27 1984		Order extending time to file response to petition until November 4, 1984.
7	Nov 7 1984		Brief of respondent Bernardo Rios-Pineda, et ux.(TO BE REPRINTED). in opposition filed.
8	Nov 7 1984		REDISTRIBUTED. November 21, 1984
10	Nov 26 1984		REDISTRIBUTED. November 30, 1984
11	Dec 3 1984		Petition GRANTED.
			**********
12	Jan 14 1985		Record filed.
14	Jan 15 1985		Order extending time to file brief of petitioner on the merits until January 25, 1985.
15	Jan 29 1985		Joint appendix filed.
16	Jan 28 1985		Brief of petitioner INS filed.
17	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 20, 1985. (4th case).
18	Feb 27 1985		Brief of respondents Bernardo Rios-Pineda, et ux. filed.
21	Mar 5 1985		CIRCULATED.
22	Mar 13 1985	X	Reply brief of petitioner INS filed.
23	Mar 20 1985		ARGUED.

83 - 2032

No.

FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
ELLIOTT SCHULDER
Assistant to the Solicitor General
JAMES A. HUNOLT
Attorney
Department of Justice
Washington D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254(a)(1) because the alien has acquired the necessary seven years' "continuous physical presence" only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute and regulation involved	2
Statement	3
Reasons for granting the petition	9
Conclusion	19
Appendix A	1a
Appendix B	11a
Appendix C	16a
Appendix D	21a
Appendix E	25a
Appendix F	30a
Appendix G	31a

TABLE OF AUTHORITIES

Cases:

Acosta v. *Gaffney*, 558 F.2d 1153	4
Agustin v. *INS*, 700 F.2d 564	16
Faustino v. *INS*, 432 F.2d 429, cert. denied, 401 U.S. 921	4
FPC v. *Idaho Power Co.*, 344 U.S. 17	15
FTC v. *Minneapolis-Honeywell Co.*, 344 U.S. 206	15
Gonzalez-Cuevas v. *INS*, 515 F.2d 1222	4
Hibbert v. *INS*, 554 F.2d 17	16, 17
INS v. *Bagamasbad*, 429 U.S. 24	10, 11
INS v. *Phinpathya*, No. 81-91 (Jan. 10, 1984)	10, 11, 12, 13, 17
INS v. *Wang*, 450 U.S. 139	10, 11-12, 13, 16, 17, 18, 19
Jay v. *Boyd*, 351 U.S. 345	11
Kimm v. *Rosenberg*, 363 U.S. 405	11

Cases—Continued: Page

Lam Chuen Ching v. *INS*, 467 F.2d 644 16
LeBlanc v. *INS*, 715 F.2d 685 ..... 11, 16
Men Keng Chang v. *Juigni*, 669 F.2d 275 16
Moore v. *INS*, 715 F.2d 13 11
Muigai v. *INS*, 682 F.2d 334 16
NLRB v. *Food Store Employees Union, Local 347*, 417 U.S. 1 15
Oum v. *INS*, 613 F.2d 51 17
Pang Kiu Fung v. *INS*, 663 F.2d 417 16
Ramirez-Gonzales v. *INS*, 695 F.2d 1208 16
Rubio de Cachu v. *INS*, 568 F.2d 625 4
Schieber v. *INS*, 520 F.2d 44 17
South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 15
Vargas-Gonzalez v. *INS*, 647 F.2d 457 5-6
Villena v. *INS*, 622 F.2d 1352 18

Statutes and regulations:

Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1105a (3) 5
8 U.S.C. 1182(c) 4
8 U.S.C. 1251(a)(2) 3
8 U.S.C. 1254(a)(1) 2, 3, 10, 12, 13
8 U.S.C. 1254(e) 4

8 C.F.R.:
Section 3.2 ..... 2, 11, 17, 18
Section 3.8 ..... 11, 17
Section 3.8(a) 6, 11, 18
Section 103.5 17
Section 242.16 5
Section 242.22 17

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 720 F.2d 529. The initial opinion of the court of appeals (App., *infra*, 16a-20a) is reported at 673 F.2d 225. The opinions of the Board of Immigration Appeals (App., *infra*, 11a-15a, 21a-24a) and the decision of the immigration judge (App., *infra*, 25a-30a), are not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a) was entered on November 9, 1983. A petition for

rehearing was denied on January 13, 1984 (App., *infra*, 32a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

8 U.S.C. 1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of Mexico. Bernardo Rios-Pineda unlawfully entered the United States in the summer of 1972 (App., *infra*, 17a). In early 1974, he returned to Mexico under threat of deportation (*id.* at 12a, 17a, 27a). Two months later, on May 1, 1974, respondents entered the United States without inspection, contrary to 8 U.S.C. 1251(a)(2) (App., *infra*, 2a, 12a, 17a, 25a-26a). Respondents effected this entry with the assistance of an alien smuggler, whom they paid about $450 for his services (*id.* at 27a-28a).

Subsequently, Mr. Rios-Pineda was apprehended by officers of the Immigration and Naturalization Service (INS) and was granted permission to return voluntarily to Mexico in lieu of deportation (App., *infra*, 28a). Although given at least two extensions of time to depart, Mr. Rios-Pineda did not do so *(ibid.)*. The INS thereupon instituted deportation proceedings against both respondents in October 1978 (*id.* at 25a-26a; R. 112-113).[1]

At a deportation hearing in December 1978, respondents, through counsel, conceded deportability and orally requested relief from deportation, alleging that they had one citizen child and were expecting a second child, that Mr. Rios-Pineda was presently employed and that an application for labor certification had been filed on his behalf (App., *infra*, 26a-27a; R. 85-86, 87). The immigration judge treated this request as an application for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1) and denied the application. The judge ruled that Mr. Rios-Pineda was ineligible for suspension of deportation because he had not attained the required seven years' "continuous physical presence" (App., *infra*, 27a, 29a). The judge noted that Mr. Rios-Pineda had initially entered the United States in the summer of 1972 and thus had not been in the United

[1] "R." refers to the certified administrative record.

States for seven years at the time of the December 1978 deportation hearing. In any event, the judge ruled that Mr. Rios-Pineda's 1974 departure under threat of deportation constituted a break in the period of continuous physical presence.[2]

Respondents took an administrative appeal to the Board of Immigration Appeals, but did not seek review of the denial of their application for suspension of deportation (R. 69-70). The Board of Immigration Appeals dismissed the appeal (App., *infra*, 21a-24a).[3]

---

[2] Although the immigration judge expressly addressed only Mr. Rios-Pineda's lack of eligibility for suspension of deportation, the necessary implication of his decision was that Mrs. Rios-Pineda was also ineligible for suspension because she too lacked the requisite seven years' "continuous physical presence."

In addition, the immigration judge denied respondents' application for voluntary departure, pursuant to 8 U.S.C. 1254(e), noting, inter alia, that respondents had used a professional smuggler to enter this country, and that Mr. Rios-Pineda failed to depart voluntarily prior to institution of deportation proceedings and had reentered this country in 1974 only two months after his departure under the threat of deportation (App., *infra*, 29a-30a).

[3] In their appeal to the BIA, respondents claimed that their deportation would result in the unconstitutional de facto deportation of their citizen child. The BIA rejected this claim as without merit (App., *infra*, 22a-23a, citing, *e.g.*, *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5th Cir. 1975); *Faustino* v. *INS*, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971)). Respondents also claimed that they were entitled to relief under 8 U.S.C. 1182(c), which permits relief from exclusion or deportation for "aliens lawfully admitted for permanent residence." The BIA found respondents ineligible for such relief because they had never been admitted as lawful permanent residents (App., *infra*, 23a). Respondents further contended that their privilege against self-incrimination was violated when they responded to the immigration judge's questions at their deportation hearing. The BIA concluded that this contention was insubstantial, noting that respondents, who were represented by counsel at the hearing, did not assert that

2. In July 1980, respondents filed a petition for review in the court of appeals, thus automatically staying their deportation pursuant to 8 U.S.C. 1105a(a)(3). Respondents claimed that their constitutional rights had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing, that their deportation would constitute an unlawful de facto deportation of their two citizen children, and that the immigration judge erred in concluding that Mr. Rios-Pineda had not been physically present in the United States for a continuous period of seven years.[4] Respondents urged the court to "order that [their] deportation * * * be suspended."[5]

In March 1982, the court of appeals reversed the decision of the Board and remanded the case for further proceedings (App., *infra*, 16a-20a). In so doing, the court did not address the merits of any of respondents' claims of error. Instead, it found that respondents had accrued the requisite seven years' "continuous physical presence" while their petition for review was pending, and it concluded that respondents had "'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing'" (*id.* at 19a, quoting *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 459

---

their responses to the questions would violate their privilege and that respondents submitted no evidence that their testimony had been compelled (App., *infra*, 24a). Indeed, the BIA observed *(ibid.)* that counsel had freely conceded respondents' deportability and had waived the reading of their rights pursuant to 8 C.F.R. 242.16. Respondents' final argument was that the order to show cause was invalid as to Mr. Rios-Pineda because at the time it was issued an application for labor certification was pending before a state agency. The BIA held that the commencement of deportation proceedings against a deportable alien is a matter within the discretion of the District Director (App., *infra*, 23a).

[4] Brief for Petitioners at 2-3, *Rios-Pineda* v. *U.S. Department of Justice*, No. 80-1619 (8th Cir.).

[5] *Id.* at 4.

(5th Cir. 1981)). The court directed the Board to hold the proceedings in abeyance for 60 days to give respondents an opportunity to file a motion to reopen their deportation proceedings (App., *infra*, 20a). In addition, the court cautioned the Board "to give careful and thorough consideration to the * * * motion to reopen if, indeed, one is filed" (*id.* at 20a n.5). The court stated that if no motion to reopen were filed within 60 days, the Board could dismiss the proceedings (*id.* at 20a).

3. Respondents filed a motion to reopen, accompanied by applications for suspension of deportation. In their motion to reopen, respondents alleged that they had been in the United States for a continuous period of seven years from the time of their entry on May 1, 1974, that they are persons of good moral character, and that deportation would result in extreme hardship to them and their citizen children (R. 17-18). With respect to the latter claim, respondents alleged that their two citizen daughters, then seven and three years of age, would be deprived of their rights to an education in United States schools and to social assistance if respondents were deported. Specifically, respondents claimed that deportation would interrupt the education of their older daughter in United States schools and would require her to attend Mexican schools where classes are conducted in Spanish. Respondents also raised general claims of psychological and economic hardship to themselves arising from "their low skills and educations" and the lower standard of living in Mexico. R. 18.

Contrary to 8 C.F.R. 3.8(a), respondents submitted no affidavits or other evidentiary materials that specifically addressed these allegations of hardship. The only materials attached to the motion to reopen were respondents' applications for suspension of deportation, copies of respondents' income tax returns, a purchase agreement for a house, a letter showing that Mr. Rios-Pineda was employed, a school record relating to respondents' older child, and birth and marriage records

(R. 20-41). Apart from their allegations of hardship, respondents pointed to certain language in the court of appeals' decision which, they asserted, showed that the court had already accepted their extreme hardship claim (R. 19).[6]

The BIA denied respondents' motion to reopen (App., *infra*, 11a-15a). It held that respondents failed to make a prima facie showing of extreme hardship necessary to establish eligibility for suspension of deportation (*id.* at 13a-14a). The Board noted that respondents had submitted no affidavits in support of their extreme hardship claim (*id.* at 13a). It examined "the documents and the vague allegations forwarded by counsel" and concluded that they were not sufficient to establish a prima facie showing of extreme hardship (*id.* at 13a-14a).

In addition, the Board concluded that the motion to reopen should in any event be denied in the exercise of its discretion (App., *infra*, 14a-15a). The BIA observed, in this regard, that respondents were able to acquire seven years' presence and the equity of a second child only by pursuing what it considered to be frivolous appeals, and it concluded that denial of a motion to reopen is appropriate where statutory eligibility for relief is acquired only by means of such dilatory tactics (*id.* at 14a). The BIA also noted that respondents entered the United States in May 1974 with the assistance of a paid smuggler and that on that occasion Mr. Rios-Pineda was returning within only two months of a

---

[6] The portion of the court of appeals' opinion relied on by respondents stated (App., *infra*, 19a):

> Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

forced departure after he had failed to depart voluntarily (*id.* at 14a-15a). Concluding that these adverse factors outweighed the equities in respondents' favor, the BIA denied the motion to reopen as a matter of discretion (*id.* at 15a).

4. The court of appeals again reversed and remanded (App., *infra*, 1a-10a). The court concluded that it had implicitly decided respondents' extreme hardship claim in their favor in its earlier decision and that this determination was binding on the Board as the "law of the case" (App. *infra*, 5a-7a). The court reviewed the factors supporting its earlier "holding" that respondents had established a prima facie case of extreme hardship and concluded that that holding was not clearly erroneous (*id.* at 7a).[7]

In the alternative, the court of appeals ruled that even if respondents' prima facie eligibility for suspension of deportation had not been decided by the court in its prior opinion, the Board abused its discretion in declining to find that respondents had made a sufficient showing of extreme hardship to warrant reopening of their deportation proceedings (App., *infra*, 7a-8a n.3). The court pointed out that Mr. Rios-Pineda had claimed his mother, a resident of Mexico, as a dependent on his federal income tax returns and that the Board had never considered the hardship to respondents that deportation might entail with respect to respondents' ability to continue supporting Mr. Rios-Pineda's mother (*id.* at 7a n.3). Furthermore, the court stated that the Board failed to consider the possibility that respondents' citizen children only speak English, thus increasing the educational and social hardship if they are forced to go to Mexico with their parents (*id.* at 8a n.3).[8]

---

[7] These factors were that Mr. Rios-Pineda had been regularly employed since 1974, that respondents had made a substantial down payment on a home, and that their citizen children had lived in the United States since birth (App., *infra*, 7a).

[8] The court of appeals failed to mention that respondents' motion to reopen did not refer to respondents' obligation to support Mr. Rios-Pineda's mother and did not allege that respondents' daughters only speak English.

The court of appeals also held that the BIA's discretionary denial of respondents' motion to reopen was based on improper factors (App., *infra*, 8a-9a). The court disagreed with the BIA's characterization of respondents' appeals as "frivolous," noting that the court had "twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the [respondents'] claim of their right to stay in this country" (*id.* at 9a). In addition, the court concluded that the Board erred in relying on respondents' "disregard" of the immigration laws, as manifested by their use of a paid smuggler and by Mr. Rios-Pineda's repeated refusal to depart voluntarily, because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (*ibid*).

REASONS FOR GRANTING THE PETITION

Since respondents' entry with the assistance of a professional smuggler in 1974, they have never lawfully been in the United States. After Mr. Rios-Pineda's apprehension, the INS granted him ample opportunity to return voluntarily to Mexico in lieu of deportation, but he failed to depart. At their deportation hearing in December 1978, both respondents conceded deportability and were ordered deported. Respondents succeeded in avoiding deportation, however, by seeking discretionary relief from deportation despite their ineligibility for such relief and by filing frivolous appeals. By these dilatory tactics, respondents managed to satisfy the seven-year eligibility requirement for suspension of deportation.

The court of appeals has concluded that the Attorney General may not exercise his discretion to deny respondents' motion to reopen based on their resort to dilatory tactics and their blatant disregard of the immigra-

tion laws. The decision below means that for respondents and other deportable aliens, the use of administrative and judicial review procedures for purposes of delay not only will be condoned, but will in fact be rewarded.

This case thus presents an important question concerning the nature and scope of the Attorney General's authority to deny a deportable alien's motion to reopen deportation proceedings as a matter of administrative discretion, without regard to whether the alien has established a prima facie case of eligibility for the ultimate relief sought. This Court has held that the Attorney General and his delegates may exercise their discretion to deny an alien's request for extraordinary relief regardless of eligibility. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976). In addition, the Court has adverted, in recent cases, to the broad discretion enjoyed by the Attorney General and his delegates in deciding whether to grant or deny a motion to reopen. *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6; *INS* v. *Wang*, 450 U.S. 139, 143-144 n.5 (1981). The decision of the court of appeals, unless overturned, would severely restrict that broad discretion with respect to the thousands of motions to reopen filed each year by deportable aliens.

1. Both the ultimate relief requested by respondents (suspension of deportation) and the procedure by which they are attempting to obtain that relief (a motion to reopen deportation proceedings) are designed to deal with the extraordinary situation.

In order to be eligible for suspension of deportation, an alien must have been physically present in the United States for a continuous period of seven years, must have been a person of good moral charcter during that time, and must be able to show that his deportation would cause "extreme hardship" to himself or to his spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1). The "extreme hardship" and

"continuous physical presence" requirements both reflect the exceptional nature of the suspension remedy. See *INS* v. *Wang*, 450 U.S. at 145; *INS* v. *Phinpathya*, slip op. 7. If an alien meets all three eligibility requirements, the Attorney General must then decide whether suspension relief is warranted in the exercise of his "unfettered discretion." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). See *Kimm* v. *Rosenberg*, 363 U.S. 405, 408 (1960). The Attorney General need not even decide whether an alien has satisfied the statutory eligibility requirements, however, where he determines that the alien's application would be denied as a matter of discretion. See *INS* v. *Bagamasbad*, *supra*; *LeBlanc* v. *INS*, 715 F.2d 685, 688-692 (1st Cir. 1983); *Moore* v. *INS*, 715 F.2d 13, 16 n.2 (1st Cir. 1983).

As this Court observed in *INS* v. *Wang*, 450 U.S. at 140-141, the Immigration and Nationality Act does not expressly provide a vehicle for reopening deportation proceedings after a final order of deportation has been issued. The INS, however, has provided by regulation for such a procedure. 8 C.F.R. 3.2, 3.8.[9] The regulations permit the BIA to reevaluate its prior disposition of cases in which significant developments have occurred subsequent to the hearings and decisions therein. This Court in *Wang* addressed the nature of the BIA's dis-

---

[9] 8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

In addition, 8 C.F.R. 3.8(a) provides that the motion to reopen shall "state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material."

cretionary authority over motions to reopen. The Court stated (450 U.S. at 143-144 n.5):

> The present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened. See *Villena* v. *INS*, 622 F.2d 1352 (CA9 1980) (en banc) (Wallace, J., dissenting). In his dissent, Judge Wallace stated that INS had discretion beyond requiring proof of a prima facie case:
>
> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations." *Id.*, at 1362.

More recently, in *INS* v. *Phinpathya*, *supra*, the Court had occasion to discuss the broad discretion of the BIA with respect to motions to reopen. The issue before the Court in *Phinpathya* was whether the alien's three-month trip abroad in 1974 had broken the continuity of her physical presence in this country, thus rendering her ineligible for suspension of deportation under 8 U.S.C. 1254(a)(1). The alien argued that the case was moot because, since her return to this country in 1974, she had been physically present in the United States for a continuous period of seven years. This Court rejected the mootness argument, noting that although the alien had filed a motion with the BIA to reopen her deportation proceeding, "granting of the motion is entirely within BIA's discretion." *INS* v. *Phinpathya*, slip op. 5 n.6.

Both *Wang* and *Phinpathya* make clear that the Attorney General and his delegates may exercise discretion to deny a motion to reopen "beyond requiring proof of a prima facie case" (*Wang*, 450 U.S. at 144 n.5). The decision below greatly restricts that discretionary authority.

2. The court of appeals assumed that the BIA retains discretion to deny motions to reopen regardless of whether the alien has established a prima facie case of eligibility for suspension of deportation (App., *infra*, 8a). The court concluded, however, that the factors considered by the BIA in exercising its discretion in this case were "improper and irrelevant" (*id.* at 9a).

a. The court of appeals rejected the BIA's conclusion that respondents had satisfied the seven year "continuous physical presence" requirement of 8 U.S.C. 1254(a)(1) only by filing "frivolous appeals" (App., *infra*, 9a). But the lack of substantive merit in respondents' ongoing litigation is readily apparent. Respondents did not raise the suspension of deportation issue in their administrative appeal to the BIA (no doubt because they had not yet satisfied the continuous physical presence requirement), and the claims they did raise, which were patently insubstantial, were rejected out of hand by the BIA (App., *infra*, 21a-24a). See note 3, *supra*. In their initial petition for review in the court of appeals, respondents raised some of the same arguments that had been rejected by the BIA.[10] In addition,

---

[10] Respondents contended that their privilege against self-incrimination had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing. Respondents made no claim that they were in custody, and they presented no evidence that their responses to the judge's questions were compelled. Moreover, as the BIA observed in rejecting this claim (App., *infra*, 24a), respondents were represented at the hearing by counsel who

respondents claimed eligibility for suspension of deportation, even though at the time they still had not accrued the requisite seven years' physical presence necessary for that relief.[11] The court of appeals addressed none of the issues raised by respondents. Instead, the court found that respondents had acquired seven years' presence while their appeal was pending, and it accordingly remanded the case to the Board to permit respondents to seek reopening of their deportation proceedings in order to apply for suspension of deportation (App., *infra*, 20a & n.5).

In rejecting the notion that respondents had pursued frivolous appeals, the court of appeals reasoned that the appeals could not have been frivolous because the court itself had granted relief (App., *infra*, 9a). But the relief that the court granted to respondents resulted solely from respondents' ability to delay their deportation by filing appeals lacking substantive merit.[12] The net ef-

---

conceded their deportability and waived the reading of their rights. Respondents' claim that their deportation would result in the unconstitutional deportation of their citizen children was correctly dismissed by the BIA as patently without merit (*id.* at 22a-23a). Finally, respondents' argument that the immigration judge erred in concluding that Mr. Rios-Pineda had failed to show seven years' "continuous physical presence" was frivolous on its face.

[11] Respondents' brief in the court of appeals was filed on November 29, 1980, less than seven years after their May 1974 entry.

[12] In concluding that respondents' initial petition for review was not frivolous, the court of appeals may have been adverting to its ruling, in another portion of the decision below (App., *infra*, 5a-7a), that in its first decision remanding the case to the BIA to consider respondents' motion to reopen, the court in fact held that respondents had made a prima facie showing of eligibility for suspension of deportation. We seriously doubt whether the court's initial decision may be so construed, since the court merely directed the Board to consider respondents' motion to reopen if one was filed (*id.* at 20a & n.5). Indeed, the court itself noted the "ambiguity" of its earlier decision (*id.* at

fect of the court's ruling is that any litigation that buys sufficient time to accrue seven years' physical presence cannot be considered frivolous. In substance, then, the court has held that delay is a valid purpose for pursuing administrative and judicial review. This decision conflicts with the decisions of numerous courts of appeals holding that the Attorney General may properly consider an alien's resort to dilatory tactics in denying a

---

6a n.2). (Because of that "ambiguity," the INS cannot be faulted (as the court below sought to do) for not challenging the court's initial decision. See *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212 (1952)). In any event, it was only due to the passage of time resulting from respondents' frivolous appeals that the court could possibly have concluded that respondents met the seven years' presence requirement.

Beyond this, it is clear that the court of appeals had no authority to find, in the first instance, that respondents had established prima facie eligibility for suspension of deportation relief. Prior to the court of appeals' initial decision, neither the BIA nor the immigration judge considered whether respondents had made a prima facie showing of extreme hardship. The immigration judge denied suspension of deportation solely because Mr. Rios-Pineda had not met the threshold requirement of seven years' "continuous physical presence;" accordingly, there was no reason for the judge to address whether Mr. Rios-Pineda had satisfied either the "good moral character" or the "extreme hardship" requirements of the statute. Respondents did not pursue their application for suspension of deportation before the BIA; as a result, the BIA had no occasion even to consider respondents' eligibility for suspension of deportation.

Thus, to the extent that the court of appeals' initial decision may be construed as embodying a "holding" for respondents on the "extreme hardship" question, the court was entirely without authority to issue such a "holding." If the court in fact intended to determine respondents' prima facie eligibility for suspension of deportation, "it usurped an administrative function." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). It therefore follows that the court below could not properly rely on its earlier "holding" as support for the proposition that respondents' prior appeals were not frivolous.

motion to reopen deportation proceedings as a matter of administrative discretion. See, *e.g.*, *LeBlanc* v. *INS*, 715 F.2d at 693; *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Muigai* v. *INS*, 682 F.2d 334, 337 (2d Cir. 1982); *Men Keng Chang* v. *Jiugni*, 669 F.2d 275, 278 (5th Cir. 1982); *Pang Kiu Fung* v. *INS*, 663 F.2d 417, 419 (2d Cir. 1981); *Hibbert* v. *INS*, 554 F.2d 17, 21 (2d Cir. 1977); *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

b. In denying respondents' motion to reopen as a matter of discretion, the BIA also took into account respondents' repeated disregard for this Nation's immigration laws, as reflected by their use of a paid smuggler when entering this country illegally and their abuse of the privilege of voluntary departure. The court of appeals cavalierly concluded that the Board's consideration of this factor was arbitrary and irrational because disregard of the immigration laws is present in most deportation proceedings (App., *infra*, 9a). But the fact that all deportable aliens have violated the immigration laws to some extent does not mean that the BIA in exercising discretion may not differentiate among such aliens on the basis of the degree to which they have flouted the immigration process. Indeed, other courts have expressly recognized the BIA's authority to consider an alien's adverse immigration history in ruling on a motion to reopen. See, *e.g.*, *LeBlanc* v. *INS*, 715 F.2d at 693; *Agustin* v. *INS*, 700 F.2d at 566; *Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1212 (9th Cir. 1983).

This Court concluded in *Wang* (450 U.S. at 143-144 n.5) that the Attorney General has broad discretion to deny a motion to reopen. If this discretion means anything, it must mean that the Attorney General may deny reopening where it is undisputed that the alien movant has engaged in actions that repeatedly manifest contempt for the immigration laws. This is particularly true where the motion to reopen is for the purpose of seeking the ultimate relief of suspension of deportation,

which is itself discretionary and which Congress designed as an exceptional remedy to be granted to only a limited number of aliens. See *INS* v. *Wang*, 450 U.S. at 145; *INS* v. *Phinpathya*, slip op. 7.

3. The court of appeals' decision restricting the Attorney General's discretionary authority to deny motions to reopen deportation proceedings will have severe adverse effects on the administration of the immigration laws. Motions to reopen are not limited to cases involving applications for suspension of deportation; rather, a motion to reopen may be filed in virtually every deportation case.[13] Such procedural devices are often used to frustrate deportation and prolong an alien's illegal stay in this country. See, *e.g.*, *Oum* v. *INS*, 613 F.2d 51, 52-54 (4th Cir. 1980); *Hibbert* v. *INS*, 544 F.2d at 21; *Schieber* v. *INS*, 520 F.2d 44 (D.C. Cir. 1975).

By disabling the Attorney General from denying relief as a matter of discretion to aliens who have used dilatory tactics in an effort to satisfy the eligibility criteria for suspension of deportation, the decision below will inevitably encourage aliens to file frivolous motions and appeals. Moreover, by restricting the Attorney General's discretion to sift out from the many motions to reopen only those that appear to have a reasonable likelihood of success, the decision below will impose a substantial burden on the administrative agency to reopen deportation proceedings in order to hold hearings

---

[13] The Executive Office of Immigration Review in the Department of Justice advises us that approximately 3,000 motions to reopen were considered by immigration judges during the year ending in April 1984. During 1983, the Board of Immigration Appeals adjudicated approximately 450 motions to reopen deportation proceedings. (A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5 and 242.22. However, where, as here, the order of deportation has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2 and 3.8.)

on, and review the merits of, numerous requests for discretionary relief.

In short, this case reveals the need to reaffirm the BIA's "'right to be restrictive'" (*INS* v. *Wang*, 450 U.S. at 144 n.5, quoting *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting)) in exercising its discretionary authority over immigration matters. It is inconceivable to us that Congress, in enacting the suspension of deportation statute, and the Attorney General, in promulgating the regulations concerning motions to reopen, meant to preclude the immigration authorities from considering an alien's prolonged and willful abuse of the immigration process itself as a basis for denying the alien's request for discretionary relief.[14]

[14] We note that if the court of appeals had upheld the BIA's reasonable exercise of discretion in denying the motion to reopen, the court would have had no occasion to reach the erroneous conclusion that respondents had made a prima facie showing of eligibility for suspension of deportation. The latter ruling is manifestly incorrect.

First, the court's reliance on the "law of the case" doctrine is misplaced because, as we have already pointed out (see note 12, *supra*), if the court in its initial decision in fact held that respondents made out a prima facie case, it acted outside the scope of its authority by usurping the administrative function of the immigration authorities in passing on applications for suspension of deportation.

Second, the court's alternative holding, that respondents established prima facie eligibility in their motion to reopen, is directly contrary to this Court's holding in *INS* v. *Wang*, *supra*. Here, as in *Wang*, the motion to reopen was not accompanied by affidavits or evidentiary materials specifically addressed to the "extreme hardship" claims, as required by the applicable regulations (8 C.F.R. 3.2 and 3.8(a)). Compare App., *infra*, 13a, with 450 U.S. at 143. Moreover, in both this case and *Wang*, the court "improvidently encroached" on the authority of the Attorney General and his delegates "to construe 'extreme hardship' narrowly." *Id.* at 144, 145. The vague and conclusory allegations of hardship in this case are virtually identical to those in *Wang*. Compare App., *infra*, 13a-14a, with 450 U.S. at 144-145. Indeed, the decision below is even more egregious than the lower court decision that the Court reversed in *Wang*. Here, the court found that the BIA erred in failing to consider certain hardship factors that the court itself gleaned from the various documents submitted by respondents (App., *infra*, 7a-8a n.3). The court faulted the Board in this regard even though respondents themselves did not even cite these factors in their motion to reopen. See page 8 and note 8, *supra*.

Although we believe that the decision below is clearly contrary to *Wang* on the prima facie eligibility issue, we have not presented this point as a separate question in this petition because reversal of the decision of the discretion issue would render the prima facie issue essentially moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JAMES A. HUNOLT
Attorney

JUNE 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1894

BERNARDO RIOS/PINEDA AND
ESTARNILADA RIOS/PINEDA DE RIOS, PETITIONERS,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE,
RESPONDENT

Submitted: March 16, 1983
Filed: Nov. 9, 1983

ON PETITION FOR REVIEW OF ORDER OF IMMIGRATION AND NATURALIZATION SERVICE

Before HEANEY and FAGG, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

This case is before us for a second time. The petitioners are Bernardo Rios-Pineda and his wife, Estarnilada Ramos de Rios. We are asked in this petition to review the July 16, 1982, decision of the Board of Immigration Appeals denying the petitioners' motion to reopen de-

---

* The HONORABLE WILLIAM C. HANSON, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

portation proceedings against them. We do not consider the instant petition in a vacuum. We are aware, as were both parties at oral argument in March of this year, of recent legislative action which would render it moot. Specifically, proposals to reform our federal immigration laws, backed by the present executive administration and twice passed by the United States Senate, would grant amnesty from deportation to millions of immigrants presently within our borders. *See* 129 Cong. Rec. S6905-S6987 (daily ed. May 18, 1983) (consideration and passage of S. 529, 98th Cong., 1st Sess. (1983)). The petitioners would be beneficiaries of this much-awaited legislation. Because it is increasingly apparent that the House of Representatives will not act on these proposals this year, however, we have no choice but to decide this case based on an immigration policy embodied in laws passed in substance over two decades ago.

Bernardo Rios-Pineda entered this country for the first time in the summer of 1972. He returned to Mexico for approximately two months in 1974. On May 1, 1974, he and his wife entered the United States without inspection at San Ysidro, California, and soon made their way to Omaha, Nebraska. Bernardo has worked at Union Packing Company in Omaha since 1974. The petitioners have two daughters born in Omaha as United States citizens: Ana Belia, who is now nine years of age; and Brenda Lee, who is four years old.

The Immigration and Naturalization Service (INS) issued orders to show cause why the petitioners should not be deported in October of 1978. After a deportation hearing on December 12, 1978, an immigration judge denied, *inter alia*, Bernardo's application for suspension of deportation under 8 U.S.C. § 1254(a)(1) (1982) (as amended). Section 1254(a)(1) provides that the Attorney General may suspend the deportation of a per-

son not lawfully admitted into the country if that person

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

Id.

The immigration judge—acting for the Attorney General's delegate, the INS—denied Bernardo's application under this section solely because he failed to meet the seven-year continuous presence requirement. The Board of Immigration Appeals (Board) dismissed the petitioners' appeal from this decision on May 30, 1980.

We reviewed the Board's May 30, 1980, dismissal in our first opinion on this case, *Rios-Pineda* v. *United States Department of Justice*, 673 F.2d 225 (8th Cir. 1982). In that opinion, we noted that both Bernardo and Estarnilada met the seven-year continuous presence requirement while the petition for review was under consideration by our Court. Citing *Vargas-Gonzalez* v. *INS*, 647 F.2d 457 (5th Cir. 1981), and outlining the petitioners' employment and family situation, we concluded "that Bernardo and Estarnilada * * * have 'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing.'" *Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 227. Accordingly, we reversed the Board's decision and granted the petitioners sixty days in which to file a "motion to reopen" their deportation proceedings, at which time the Board was directed to "promptly consider and rule upon their claim that

they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1)." *Id.* at 228 (footnote omitted).

On July 16, 1982, the Board denied the petitioners' motion to reopen after remand from this Court. First, the Board declared that it would deny the motion, regardless of its merit, because it had been filed in an untimely and improper manner. *See* 8 C.F.R. §§ 3.2, 3.8 (1983). Second, assuming that the motion were properly filed, the Board held that the petitioners, by exhibits filed and allegations made in that motion, failed to make a "prima facie showing of extreme hardship to establish eligibility for suspension of deportation." Finally, the Board held that the motion should alternatively be denied in the exercise of discretion because the petitioners "acquired their 7 years of physical presence and the additional factor of their second child" by filing "frivolous appeals," and because they showed "disregard for our immigration laws by paying a smuggler to help them avoid inspection [in 1974] and by failing to depart voluntarily."

On petition for review of the Board's July 16, 1982, decision, Bernardo and Estarnilada contend that the Board abused its discretion in summarily denying their motion to reopen. They assert that the motion and supporting exhibits were filed with the Board within the time constraints set out in our earlier opinion. They also contend that, given that opinion, their motion, and the filed exhibits, the Board erred in finding that they had failed to establish a prima facie case of extreme hardship. Finally, they assert that the discretionary reasons given by the Board for denying them any relief were improper. Because of the unique course of proceedings in this case, we agree with the petitioners' contentions and remand to the Board to grant their motion to reopen and to afford them an opportunity to fully substantiate their claims that deportation would

cause extreme hardship to themselves or their United States citizen children.

First, we hold that their motion to reopen was properly filed within the constraints set out in our earlier order of remand. *See Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 228 & n.4. While we agree that the motion apparently did not reach the party designated in 8 C.F.R. § 3.8 (1983) within the sixty-day period set forth in our decision, the record shows that the motion was received by other Board officials within that time period. A memorandum from the INS District Director in Omaha to the Board's national office on June 24, 1982, acknowledged that the motion had been mailed directly to the Board on May 7, 1982.[1] Thus, the Board received the motion within sixty days of our March 12, 1982, opinion, even though the precise officer designated in the regulations was not forwarded the motion until later. *See id.* § 3.8(b). We refuse to give this technical error in filing dispositive significance in a case of such importance to the petitioners and their family.

Next, we agree with the petitioners that the Board erred in denying the motion to reopen for want of a prima facie showing of the extreme hardship necessary to be eligible for section 1254(a)(1) relief. Normally, we review the Board's findings regarding a prima facie case of extreme hardship sufficient to merit reopening under an abuse of discretion standard. *See INS* v. *Wang*, 450 U.S. 139, 142, 144-145 (1981) (per curiam); *Diaz-Salazar* v. *INS*, 700 F.2d 1156, 1159-1160 (7th Cir.), *cert. denied*, 103 S. Ct. 3112 (1983); *Aiyadurai* v. *INS*, 683 F.2d 1195, 1199 (8th Cir. 1982). Where an issue has previously been decided on appeal, however, that decision binds a tribunal on remand as the law of

---

[1] We assume that the reference to the Board in the text of this memorandum was to its regional office in Nebraska.

the case unless the decision was clearly erroneous or would result in a manifest injustice. *Otten* v. *Stonewall Insurance Co.*, 538 F.2d 210, 212-213 (8th Cir. 1976). The "law of the case" doctrine is equally applicable in instances of remand to administrative agencies and remand to lower courts. *City of Cleveland* v. *Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977). *See also Todd & Co.* v. *SEC*, 637 F.2d 154, 156-157 (3d Cir. 1980).

In the instant case, we concluded that the fulfillment of the seven-year continuous presence requirement pending our review merited remand for further proceedings on the petitioners' section 1254(a)(1) claims. *Rios-Pineda* v. *United States Department of Justice*, *supra*, 673 F.2d at 227-228. Implicit in this conclusion was our decision that a prima facie case of extreme hardship, along with the other requirements of section 1254(a)(1), had already been established; thus, we remanded for prompt consideration and ruling on petitioners' "*claim*" for section 1254(a)(1) relief, not just for extra time to file a motion to reopen in the normal course. *Id.* at 228 (emphasis added).[2] The Fifth Circuit case cited in support of our remand was likewise one in which the court found a prima facie case meriting full consideration on remand. *Vargas-Gonzalez* v. *INS*, *supra*, 647 F.2d at 459 & n.4. Therefore, our holding of prima facie eligibility for a section 1254(a)(1) suspension

[2] We realize that in the closing footnote to our previous opinion, we stated that the Board should give "careful and thorough consideration to the new motion to reopen." *Rios-Pineda* v. *United States Department of Justice*, 673 F.2d 225, 228 n.5 (8th Cir. 1982). Although this language could be read in isolation to indicate that the Board was free to make an independent ruling regarding the prima facie case issue on remand, the language of the text indicated equally strongly that we had made final disposition of that issue. In fairness to the petitioners, we resolve whatever ambiguity we created in footnote 5 of our earlier decision in their favor.

was the law of the instant case, not challenged by the Board before this Court en banc or on certiorari to the Supreme Court.

As we view this holding today, we conclude that it is not clearly erroneous. The only prima facie factor which conceivably could have been decided against the petitioners after the seven-year continuous presence requirement was met would be the extreme hardship to the petitioners or their United States citizen children. The record of this case in 1982 clearly established that Bernardo had been regularly employed by Union Packing Company since 1974, and that the petitioners had made a substantial down payment on a home. Additionally, the petitioners' citizen children had lived in the United States since birth. These facts are reinforced by the exhibits filed by the petitioners on remand after our 1982 decision. And importantly, neither the immigration judge nor the Board questioned any element of prima facie eligibility, besides the seven-year prerequisite, before our 1982 opinion. These circumstances are sufficient to support our previous holding of prima facie eligibility. Furthermore, we find no manifest injustice to the Board in affirming this holding as the law of the case, if indeed any such injustice could be experienced by an agency of the government.[3]

[3] Even were we to hold that the petitioners' prima facie eligibility for suspension of deportation was not a matter previously decided by this Court, we would find that the Board abused its discretion in declining to find the requisite extreme hardship to merit reopening the deportation proceedings herein. A careful examination of the exhibits filed with the petitioners' motion to reopen reveals that for several years, Bernardo claimed his mother in Mexico, Guadalupe Pineda, as a dependent on his United States federal income tax returns. The burden placed on the petitioners by deporting them in the face of such family ties and responsibilities has never been considered by the Board. In addition, the motion to reopen indicates that the petitioners' United States-born children may only speak English, increasing

Finally, we must address the Board's exercise of discretion over and above the establishment of a prima facie case of eligibility, an issue which we did not consider in our prior decision. The Ninth Circuit has held that once a prima facie case of eligibility under section 1254(a)(1) is established, the Board abuses its discretion in refusing to reopen and grant a hearing on the matter. *Villena* v. *INS*, 622 F.2d 1352, 1361 n.12 (9th Cir. 1980); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 593 (9th Cir. 1978). Decisions by other courts intimate, however, that the Board may exercise the Attorney General's discretion, reflected both in statute and regulations, to deny a motion to reopen even after the petitioner has established a prima facie case of eligibility. *See INS* v. *Wang*, *supra*, 450 U.S. at 143 n.5; *LeBlanc* v. *INS*, 715 F.2d 685, 692 (1st Cir. 1983); *Moore* v. *INS*, 715 F.2d 13, 16 n.2 (1st Cir. 1983). Even assuming that the latter approach is correct and applicable to a motion to reopen on remand from an appellate court, we cannot accept the reasons given by the Board to

---

their educational and social hardship should they be forced to go to Mexico with their parents, especially in the case of Ana Belia who has completed several years of education in Omaha. The Board's decision on remand from this Court failed to consider these specific factors, alone or in the aggregate with others in the record, as relevant to a prima facie showing of extreme hardship. Such disregard is an abuse of discretion. *See Batoon* v. *INS*, 707 F.2d 399, 401-402 (9th Cir. 1983); *Antoine-Dorcelli* v. *INS*, 703 F.2d 19, 20-21 (1st Cir. 1983); *Ramos* v. *INS*, 695 F.2d 181, 186 & n.12, 188 (5th Cir. 1983); *Santana-Figueroa* v. *INS*, 644 F.2d 1354, 1356 (9th Cir. 1981).

Furthermore, several courts have recognized the difficulty in declaring no extreme hardship to an immigrant's United States citizen children without a hearing. *E.g.*, *Luna* v. *INS*, 709 F.2d 126, 128 (1st Cir. 1983); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 594 (9th Cir. 1978). We agree with these courts and consider this an important factor in reviewing any denial of a motion to reopen in which extreme hardship to United States citizen children is alleged and supported by evidence.

support its denial of the petitioners' motion to reopen "in the exercise of discretion."

The Board first held that the petitioners prolonged their presence in this country, thus meeting the seven-year requirement of section 1254(a)(1), by filing "frivolous appeals." While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, *see LeBlanc* v. *INS*, *supra*, 715 F.2d at 693, the appeals and petitions for review in this case do not fall into the "frivolous" category. Indeed, this Court has now twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the petitioners' claim of their right to stay in this country. The other discretionary factor considered by the Board in denying the motion to reopen was the petitioners' "disregard" of our immigration laws by using a paid smuggler to illegally enter this country and refusing to depart voluntarily. Such "disregard" is necessarily present in some form in most deportation proceedings, however, and we find reliance on this factor to be "arbitrary, irrational, [and] contrary to the law." *Batoon* v. *INS*, 707 F.2d 399, 401 (9th Cir. 1983) (citation omitted). Consideration of these improper and irrelevant factors tainted the Board's exercise of discretion and is therefore grounds to reverse the denial to reopen the petitioners' case. *See Chung* v. *United States INS*, 602 F.2d 608, 612 n.7 (3d Cir. 1979).

In short, we find that the Board abused the discretion which remained after our remand of this case by refusing to give the petitioners a full and fair opportunity to present their evidence of extreme hardship and failing to render a reasoned decision based upon that evidence. The Board was not free to reconsider the prima facie case issue, and it abused the Attorney General's discretion in denying the petitioners' motion regardless of their prima facie showing. We do not ques-

tion the Board's sincerity in attempting to implement the immigration policy which languishes in our federal statutes. We do require that policy be followed to the letter and in a spirit of total fairness to those persons who may be permanently exiled from our shores as a result of its implementation. We therefore remand to the Board with directions that it reopen the petitioners' deportation proceedings, with a full hearing before an immigration judge if requested, in order to make a reasoned determination of their eligibility for a section 1254(a)(1) suspension of deportation by virtue of the resultant extreme hardship to themselves or either of their daughters, Ana Belia or Brenda Lee.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

July 16, 1982

Files: A22 733 395—Omaha
A22 733 397

In re: BERNARDO *RIOS*-PINEDA
ESTARNILADA RAMOS DE *RIOS*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Roman de la Campa, Esquire
2219 Allan Street
Sioux City, Iowa 51103

ON BEHALF OF SERVICE:
Anthony Kieffer
Acting General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entry without inspection

APPLICATION: Motion to reopen

This case is before us on remand from a decision on the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the respondents 60 days in which to properly file a motion to reopen to apply for suspension of deportation. The respondents have submitted a motion to reopen. The motion will be denied and our order of May 30, 1980, will be reaffirmed.

In a decision dated December 12, 1978, the immigration judge found the respondents deportable on their own admissions to having entered without inspection on

May 1, 1974. He further refused to accept the male respondent's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both respondents' requests for voluntary departure in the exercise of discretion. An appeal from that decision was dismissed by the Board on May 30, 1980. The respondents filed a petition for review of our decision on July 16, 1980. The Court remanded the record because the respondents acquired 7 years of physical presence during the pendency of the appeal.

The male respondent is a 30-year-old native and citizen of Mexico. At deportation proceedings, he testified that he first entered the United States in the summer of 1972, but his suspension application states that his first entry was in June 1971. The record reflects that he left the United States in March 1974 pursuant to an administrative grant of voluntary departure and returned with the assistance of a smuggler on May 1, 1974. The female is a 33-year-old native and citizen of Mexico who entered the United States on May 1, 1974, with her husband. The respondents have two United States citizen children born November 8, 1974, and February 9, 1979.

According to the order of the Circuit Court, the respondents were granted 60 days from March 12, 1982, to file a proper motion to the Board in accordance with the controlling regulations which the Court noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8. Under the provisions of 8 C.F.R. 3.8(b), an alien must submit a motion to reopen in triplicate to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted so that one copy is available each for that officer, the officer who rendered the initial decision in the case, and the Board.

The record before us indicates that the respondents' motion papers were not properly filed with the District Director in Omaha until May 21, 1982, some 10 days after the expiration of the period granted by the Court. Although at the top of a typed motion, counsel has written "Submitted: by certified mail May 6, 1982," the motion is itself undated and the envelope in which it was mailed has not been included in the record. We are consequently unable to determine the actual date on which the motion was mailed. However, a memorandum from the Appellate Trial Attorney forwarding the respondents' motion, which was improperly filed with that office, to the District Director in Omaha is dated May 18, 1982.

Even assuming that the respondents' motion was mailed within the time permitted by the Court, it cannot be considered properly filed in a timely manner because it was not submitted to the District Director in Omaha as required by the regulations until May 21, 1982. We believe that the respondents' failure to properly file their motion to reopen within the period allowed is sufficient cause for denial of the motion.

Even were the motion properly filed, we would conclude that the respondents have not made a prima facie showing of extreme hardship to establish eligibility for suspension of deportation. The respondents' motion consists of their suspension application, copies of birth and marriage certificates, income tax returns, a letter of employment, a contract for the purchase of a home, and the typed motion of their attorney. The respondents have submitted no affidavits attesting to the extreme hardship they may suffer from deportation. The motion signed by their attorney refers only to the psychological hardship of the respondents resulting from their inability to enjoy the higher standard of living in this country, which they have acquired despite their "low skills and education," and to the hardship of their children in being deprived of their rights as citizens to be educated in American schools and to receive social assistance. Having considered the documents and the

vague allegations forwarded by counsel, we are not persuaded that they are sufficient to establish a prima facie showing of extreme hardship. *See Lee v. INS*, 550 F.2d 554 (9 Cir. 1977); *Matter of Reyes*, Interim Decision ____ (BIA June 30, 1982).

In any case, we believe that the motion should be denied in the exercise of discretion. At the time of the respondents' deportation hearing they had been continuously present in the United States for less than 5 years and had only one child. They were able to acquire 7 years of physical presence and the additional equity of their second child only by filing what we consider to be frivolous appeals. For example, the arguments forwarded in their appeal to the Board ranged from a claim that the male respondent was eligible for section 212(c) relief although he had never been a lawful permanent resident, to the assertion that the immigration judge's interrogation of the respondents violated their rights against self-incrimination, despite the fact that no objection had been raised below. In this regard, we would also note that the Circuit Court did not address the merits of the contentions forwarded in the petition to review, but stated that the Board could dismiss the appeal if the respondents failed to file a proper motion within the specified time. Where an alien's eligibility for relief from deportation has been acquired after a deportation order is in effect only by the filing of frivolous applications or appeals or by other evasive or dilatory actions, the denial of a motion to reopen has been considered appropriate. *See Men Keng Chang* v. *Jiugni*, 669 F.2d 275 (5 Cir. 1982); *Oum* v. *INS*, 613 F.2d 51 (4 Cir. 1980); *Hibbert* v. *INS*, 554 F.2d 17 (2 Cir. 1977); *Lee* v. *INS*, *supra*; *Matter of Reyes*, *supra*.

In denying the respondents' request for voluntary departure, the immigration judge noted that they both entered the United States with the assistance of a paid smuggler and that the male respondent was returning

after a forced absence of only 2 months. Prior to the male respondent's departure, he had been granted administrative voluntary departure which was extended once and he nevertheless failed to leave voluntarily.

Considering the facts that the respondents acquired their 7 years of physical presence and the additional factor of their second child more than 2 years after they were ordered deported and that they have evidenced their disregard for our immigration laws by paying a smuggler to help them avoid inspection and by failing to depart voluntarily, we believe that these adverse factors outweigh the equities which have been identified by the respondents in their motion. Accordingly, we do not believe that reopening of proceedings is warranted as a matter of discretion. The motion to reopen will be denied.

ORDER: The motion to reopen is denied and our decision ordering the respondents deported is reaffirmed.

/s/ DAVID L. MILHOLLAN
DAVID L. MILHOLLAN
Chairman

Board Member James P. Morris has abstained from consideration of this case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1619

BERNARDO RIOS-PINEDA, A 22 733 395, HUSBAND, AND ESTARNILADA RAMOS DE RIOS, A 22 733 397, WIFE, PETITIONERS,

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICES, OMAHA, NEBRASKA, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION AND NATURALIZATION SERVICE.

Submitted: March 11, 1981
Filed: March 12, 1982

Before HEANEY, HENLEY and McMILLIAN, Circuit Judges.

HEANEY, Circuit Judge.

Bernardo Rios-Pineda and his wife, Estarnilada Ramos de Rios, seek review of the Board of Immigration Appeals' May 30, 1980, decision which held that: (1) Bernardo and Estarnilada are deportable under 8 U.S.C. § 1251(a)(2); (2) voluntary departure under 8 U.S.C. § 1254(e) is inappropriate; (3) Bernardo is ineligible for relief under 8 U.S.C. § 1182(c); and (4)

Bernardo is statutorily ineligible to be considered for suspension of deportation under 8 U.S.C. § 1254(a)(1). For the reasons set forth below, we reverse the Board of Immigration Appeals' decision and remand for further proceedings consistent with this opinion.

Bernardo Rios-Pineda and Estarnilada Ramos de Rios were married in Mexico in 1971. In the summer of 1972, Bernardo unlawfully entered the United States, but returned to Mexico sometime around March of 1974 after he was apprehended by Immigration and Naturalization Service (INS) officials in Chicago.[1]

On May 1, 1974, Bernardo and Estarnilada entered the United States without inspection at San Ysidro, California, and subsequently made their way to Omaha, Nebraska, where they have resided ever since. Bernardo has worked for the Union Packing Company in Omaha continuously since 1974 and Estarnilada has been a housewife.

At the time of the December 12, 1978, deportation hearing before an Immigration Judge, Bernardo was earning $6.40 an hour for his job at Union Packing.[2] The couple owned an autombile and were buying a home for which they had initially paid a $3,000 downpayment. Bernardo and Estarnilada are the parents of two daughters, both of whom were born in Omaha: Ana Belia, born on November 8, 1974; and Brenda Lee, born on February 9, 1979.

On October 24, 1978, separate show cause orders alleging deportability under Section 241(a)(2) of the Immigration and Nationality Act (8 U.S.C. § 1251(a)(2)),

---

[1] Bernardo testified at his December 12, 1978, deportation hearing that he was allowed to leave the United States in 1974 and that no deportation hearing was conducted at that time.

[2] The record reveals that an application for a labor certificate for Bernardo was filed at the Nebraska Labor Department. Although the record is not clear, it appears that Union Packing Company filed the application on Bernardo's behalf.

were issued against Bernardo and Estarnilada. A joint deportation hearing was held before an Immigration Judge in Omaha on December 12, 1978. The Immigration Judge held, inter alia, that an application for suspension of deportation pursuant to 8 U.S.C. § 1254(a)(1)[3] could not be considered as a matter of law because Bernardo did not satisfy the requirement of seven years continuous presence in the United States. The Immigration Judge ordered both Bernardo and Estarnilada to be deported to Mexico.

On May 30, 1980, the Board of Immigration Appeals affirmed the Immigration Judge's decision and a timely petition for review was subsequently filed in this Court.

In *INS* v. *Jong Ha Wang*, 450 U.S. 139, 139-140 (1981) (per curiam), the Supreme Court stated that 8 U.S.C. § 1254(a)(1)

> provides that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) has been physically present in the United States for not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." The Attorney General is authorized to delegate his powers under the Act, 8 U.S.C. § 1103, and his authority under § 244 has been delegated by regulation to specified authorities in the Immigration and Naturalization Service. 8 C.F.R. § 2.1 (1979). [Footnotes omitted.]

[3] 8 U.S.C. § 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

In *Vargas-Gonzalez* v. *INS*, 647 F.2d 457 (5th Cir. 1981), the Fifth Circuit reversed a deportation decision by the Board of Immigration Appeals and remanded the proceeding so that the Board could reconsider the petitioner's eligibility for suspension of deportation because the seven-year continuous presence requirement under § 1254(a)(1) had been established during the pendency of the appeal. *Id.* at 458-459. The Court observed that the petitioner, having met the seven-year continous presence requirement, established—via facts contained in the record—"a prima facie case entitling him upon proper procedural application to reopen the case for reconsideration of his application for suspension of deportation." *Id.* at 459.

We conclude that Bernardo and Estarnilada, like the petitioner in *Vargas-Gonzalez*, have "made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing. * * *" *Id.* We accordingly reverse the Board's decision and remand for further proceedings.

III

In remanding this cause to the Board for further proceedings, we direct the Board to hold this matter in abeyance for sixty days from the date of this decision. If Bernardo and Estarnilada file a proper motion to reopen[4] within the sixty-day period, the Board shall promptly consider and rule upon their claim that they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1).[5] If no motion to reopen is filed within sixty days, the Board may dismiss this matter.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

[4] If a motion to reopen is filed, it should be in accordance with applicable INS regulations as described by the Supreme Court in *INS* v. *Jong Ha Wang*, 450 U.S. 139, 140-141 & n.3 (1981). *See* 8 C.F.R. §§ 3.2, 3.8 (1981).

[5] We caution the Board to give careful and thorough consideration to the new motion to reopen if, indeed, one is filed. *See, e.g., Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981) (per curiam).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

May 30, 1980

Files: A22 733 395 - Omaha
A22 733 397

In re: BERNADO *RIOS* PINEDA, and ESTARNILADA RAMOS DE *RIOS*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Roman de la Campa, Esquire
2219 Allan Street
Sioux City, Iowa 51103

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entry without inspection

APPLICATION: Termination

The respondents appeal from the decision of an immigration judge dated December 12, 1978, in which they were found deportable as charged and denied the privilege of voluntary departure. The appeal will be dismissed.

The respondents, husband and wife, are both natives and citizens of Mexico, who last entered the United States on or about May 1, 1974. On October 24, 1978, the Service issued an Order to Show Cause charging the respondents with deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as aliens who had entered without inspection.

At the deportation hearing, the respondents, represented by counsel, admitted the factual allegations of the Order to Show Cause and conceded deportability under section 241(a)(2) of the Act. The immigration judge denied the male respondent's request for suspension of deportation upon finding that he had not met the seven year continuous physical presence requirement of section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). In addition, the immigration judge denied the male respondent's request for voluntary departure in light of his entry with the aid of a smuggler, the fact that he had previously been permitted to leave the United States without the issuance of an Order to Show Cause and had re-entered illegally two months thereafter and his apparent hesitancy to voluntarily depart from this country. Although the immigration judge did not find the same number of adverse factors present in the female respondent's case, he denied her voluntary departure as a matter of discretion in order to preserve the family unit.

On appeal, counsel for the respondent argues that the deportation of the respondents violates the constitutional rights of their minor United States citizen child. In addition, it is maintained that the male respondent is eligible for relief from deportation under section 212(c) of the Act, 8 U.S.C. 1182(c) since he has continuously resided in the United States for a seven year period. Furthermore, it is contended that the proceedings should be terminated since the respondent's employer has filed for a labor certificate on his behalf. Finally, counsel for the respondent argues that the immigration judge's interrogation of the respondents at the hearing violated their rights against self-incrimination under the fifth amendment of the United States Constitution.

Counsel's contention that the deportation of the respondents amounts to an unconstitutional deportation of their United States citizen child is without merit. Al-

though it has been recognized that the deportation of alien parents may result in the de facto deportation of minor citizen children, such deportation has not been viewed as violating any constitutional rights of such children. *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9 Cir. 1977); *Faustino* v. *INS*, 432 F.2d 429 (2 Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3 Cir. 1977); *Aalund* v. *Marshall*, 461 F.2d 710 (5 Cir. 1972). Alien parents who have violated the immigration laws cannot gain favored status, directly or vicariously, through their citizen children over those aliens complying with the immigration laws. *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222 (5 Cir. 1975).

Counsel's contention that the male respondent is eligible for section 212(c) relief is also without merit. Relief under section 212(c) of the Act is specifically limited to those "aliens lawfully admitted for permanent residence" in the United States. The respondent here entered the United States without inspection and has never been admitted to this country as a lawful permanent resident. Consequently, he is ineligible for relief under section 212(c) of the Act.

It is further maintained that the deportation proceedings should be terminated against the male respondent since the Order to Show Cause was issued while a labor certificate application filed on his behalf was pending at the Nebraska Labor Department. However, it is within the prosecutorial discretion of the District Director whether to institute deportation proceedings against a deportable alien. Where deportation proceedings have commenced, neither the immigration judge nor this Board has jurisdiction to review the District Director's decision to prosecute by instituting deportation proceedings. *See Matter of Merced*, 14 I&N Dec. 644 (BIA 1974); *Matter of Geronimo*, 13 I&N Dec. 680 (BIA 1971).

Finally, counsel's argument that the immigration judge violated the respondents' fifth amendment rights against self-incrimination by forcing them to answer questions posed to them is also without merit. Since the respondents have been charged with entry without inspection, a federal criminal offense under section 275 of the Act, 8 U.S.C. 1325, they could have refused to answer, on fifth amendment grounds, any questions which they reasonably believed had a tendency to incriminate them. *Matter of Carrillo*, Interim Decision 2717 (BIA 1979); *Matter of R*, 4 I&N Dec 720 (BIA 1952). However, counsel did not object to any of the questions at the time of the hearing, and no evidence in support of a coercion claim has been submitted on appeal. There is nothing in the transcript of the deportation hearing indicating that the respondents' admissions were induced by coercion, duress, or improper action on the part of the immigration judge. *See Cuevas-Ortega* v. *INS*, 588 F.2d 1274 (9 Cir. 1979). To the contrary, counsel for the respondents plead to the factual allegations of the Order to Show Cause on the respondents' behalf and freely admitted those allegations and conceded to the deportability of the respondents. In fact, counsel also waived the reading to the respondents of the rights provided them under 8 C.F.R. 242.16. In light of the foregoing, we conclude that the respondents were not deprived of their rights against self-incrimination and the appeal, accordingly, will be dismissed.

ORDER: The appeal is dismissed.

/S/ DAVID L. MILHOLLAN

DAVID L. MILHOLLAN
Chairman

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION COURT

August 29, 1980
[Amending decision of December 12, 1978]

Files: A22 733 395-Omaha
A22 733 397-Omaha

In the Matter of

BERNARDO RIOS-PINEDA

AND

ESTARNILADA RAMOS DE RIOS, RESPONDENTS

IN DEPORTATION PROCEEDINGS

CHARGE: I&N Act, Section 241(a)(2), entry without inspection
LODGE: None
APPLICATION: Termination voluntary departure for the male respondent
Termination voluntary departure for the female respondent

IN BEHALF OF RESPONDENT:
Roman de la Campa
2219 Allan Street
Sioux City, IA 51103

IN BEHALF OF SERVICE:
Anthony Kieffer
Acting Trial Attorney
Omaha, Nebraska

DECISION OF THE IMMIGRATION JUDGE

The record relates to a man and wife, both natives and citizens of Mexico, who are charged with entering the United States without inspection.

The male respondent is a 27 year old, married male alien, a native and citizen of Mexico who entered the United States at or near San Ysidro, California, on about May 1, 1974, without being inspected. On Octo-

ber 24, 1978, an Order to Show Cause issued against the male respondent, alleging alienage, the above entry information, and further alleging that at the time of the entry he was not inspected by the United States Immigration Officer.

The Order to Show Cause charges deportability under provision of Section 241(a)(2) of the Immigration and Nationality Act, in that, respondent did enter the United States without inspection.

The female alien is a 29 year old, married, female alien, native and citizen of Mexico, who is charged with entering the United States at or near San Ysidro, California, on about May 1, 1974.

On October 24, 1978, an Order to Show Cause issued against her alleging alienage the above entry information, and further alleging that at the time of the entry she was not inspected by a United States Immigration Officer. The Order to Show Cause charges deportability under Section 241(a)(2) of the Immigration and Nationality Act, in that respondent entered the United States without inspection.

At a joint deportation hearing held before me this day, each respondent through Counsel admitted the allegations and the charge in the Order to Show Cause thereby conceding deportability.

The respondents through Counsel made application for suspension of deportation alleging that the male respondent had been in the United States since 1972 and would be eligible for the relief of deportation. Also, further alleging that the Service was estopped from deporting the respondents, that the proceedings should be held in abeyance until Administrative relief was available to the respondents as the male respondent's employer had filed a labor certification in his behalf, also on the *Acosta decision*, a District Court Decision rendered by the United States District Court in New Jersey, reversed in *Acosta* vs. *Gaffney*, 558 F 2d 1153 (3

Cir-1977). The Attorney for the respondents alleging that as they are parents of a United States citizen (a daughter) the deportation of the respondents would result in a defacto deportation of the United States citizen child. The father testified that he would not leave the child in the United States, but would take the child with them. Testimony was alleged to indicate that the female respondent is expecting another child in January of 1979.

The application for Suspension of Deportation was not allowed as the evidence of record indicates that the male respondent is ineligible for such relief as a matter of law. Section 244(a)(1) of the Immigration and Nationality Act, lists eligibility requirements for such a relief, which is pertinent to this decision, that an alien must have a continuous physical presence of more than seven years to be eligible for such relief. Viewing the evidence most strongly in favor of such an application, it indicates that the respondent was first in the United States during the summer months of 1972. The hearing is being held in December 1978. It shows that the maximum residence or physical presence respondent has is approximately six and a half years in the United States—lacking is the statutory seven years requirement for such relief. Additionally, the respondent testified that in 1974 he was apprehended by the Immigration Officials in Chicago and allowed to leave the United States without a hearing such as he is having today. Decisions have held that such a forced departure from the United States breaks any continuity of physical presence. See *Matter of Barragan* 13 I&N, DEC. (BIA-1971)

Each of the respondents have made application for the privilege of voluntary departure in lieu of deportation under the provision of Section 244(e) of the Immigration and Nationality Act. Testimony in this connection was elicited to show that the male respondent

entered the United States, the last entry, with his wife, through the services of a professional smuggler—paying the smuggler $225.00 to assist him, and $225.00 to assist his wife enter the United States. He has testified that he was apprehended in the Omaha area by the Immigration Service prior to the present case, and thereafter, was allowed to extend his stay on two or three occasions. The last time he received an extension of his stay it was indicated to him that no further extension would be granted. He did not return to the Immigration Office for further extensions of stay. He did not depart within the period of time that was granted to him. Male respondent has testified he has worked for the Union Packing Company in Omaha earning $6.40 an hour for the last two years. The male resondent testified he and his wife recently purchased a home, and paid approximately $3,000.00 towards the purchase price of their home.

I find that voluntary departure in lieu of deportation is the only relief which the two respondents are eligible to receive. Favorable factors in the male respondents case are: the absence of any criminal record, being the father of a United States citizen child, and expecting another child which in all probability will be born in the United States and the equity he has in a house which he has recently bought. The unfavorable factors in the male respondents case are that he entered the United States through the services of a professional smuggler for he and his wife, also, that the respondent was apprehended by the Immigration Officials in the Omaha area and was given a period of time in which to leave the United States. He has this time extended, and when notified that he would not receive another extension he failed to come back to the Immigration Office and failed to depart the United States as required. Also, the respondent has been working in the United States for four and a half years earning approximately

the last two years, $6.40 an hour, displacing persons in the United States lawfully of such employment. Although the respondent professed at first that he would not leave the United States if granted voluntary departure on reflection he testified that he would leave. I find that the respondent is statutorily eligible for the relief of voluntary departure in lieu of deportation.

Based upon the admissions the respondent has made before me today, I find that deportability has been established in each case by clear, convincing and unequivocal evidence, which is the burden placed upon the Service by regulations, 8 CFR 242.14(a), which recites the rule laid down by the Supreme Court in *Woodby* vs. *INS*, 385 U.S. 276, 87 S. ct 483, 17 L Ed 2d 362 (1966). I find that the male respondent is statutorily ineligible for relief of Suspension of Deportation as he is lacking the requisite statutory period of continuous physical presence and because his physical presence was interrupted in 1974 when he was required to depart the United States by the Immigration Service. See *Matter of Barragan*, 13 I&N Dec 759 (1971).

The remaining question to be decided is whether voluntary departure in lieu of deportation shall be granted to the respondents in the exercise of discretion. As to the male respondent, balancing the favorable factors versus the adverse factors, I find that the adverse factors outweigh the favorable factors and in the exercise of discretion will deny his application for voluntary departure. As mentioned above I find that the favorable factors, are—the parent of a United States citizen child, lack of criminal record, and purchasing a home in the United States. Balancing against these favorable factors are the facts that each (male respondent and female respondent) paid a smuggler to enter the United States, male respondent has been in the United States working earning $6.40 per hour for the past two years displacing a person that is lawfully in the United States

of such employment, that he was given an opportunity to leave the United States without issuance of an Order to Show Cause but failed to leave the United States, and when, in 1974, allowed to leave the United States without the issuance of an Order to Show Cause remained in Mexico approximately two months when he again entered the United States illegally. As the unfavorable factors outweigh the favorable factors, I will deny his application in the exercise of discretion and order his deportation from the United States. In the *Matter of Arde*, 13 I&N Dec 494 (BIA-1970).

The female respondent's testimony indicates she also had the use of a professional smuggler to enter the United States. The record is absent the other adverse factors present in the male respondent's case. However, in order to maintain the integrity of the family and because the use of a professional smugler is not to be rewarded, in the exercise of discretion, I will deny her application for voluntary departure in lieu of deportation.

Each of the respondents has chosen to be sent to Mexico if deported from the United States and I have so directed deportation to Mexico if ordered deported.

ORDER: IT IS ORDERED that in accordance with the above decision that both respondents be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

/S/ JESSE M. SELLERS
JESSE M. SELLERS
Immigration Judge

August 29, 1980
Date

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SEPTEMBER TERM, 1983

No. 82-1894

BERNARDO RIOS/PINEDA, ET AL, PETITIONERS.

v.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

JUDGMENT

Petition for Review of an Order of the Immigration and Naturalization Service.

This cause came on to be submitted on petition for review of an order of the Immigration and Naturalization Service, administrative record, appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the decision of the Board be, and it is hereby, reversed and remanded in accordance with the opinion of this Court.

November 9, 1983

(See attached sheet for cost information.)

A TRUE COPY:

ATTEST: Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit
1/24/84

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SEPTEMBER TERM, 1983

No. 82-1894

BERNARDO RIOS/PINEDA, ET AL., PETITIONERS,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT

PETITION FOR REVIEW OF ORDER OF IMMIGRATION AND NATURALIZATION SERVICE

The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

January 13, 1984

Office-Supreme Court, U.S.
FILED
NOV 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2032

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS
RESPONDENTS

Response to:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Roman de la Campa
2219 Allan Street
Sioux City, Iowa 51103

ATTORNEY FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Attorney General and his delegates have the authority to improperly deny Petitioners' motion to reopen deportation proceedings after the United States Court of Appeals for the Eighth Circuit has remanded this case to the B.I.A. on 3/12/82 with specific directions as follows:

> "We caution the Board to give careful and thorough consideration to the motion to reopen..."[1]

2. If the Supreme Court of the United States has jurisdiction under 28 U.S.C. 1254(1) to decide on a Writ of Certiorari filed in this court on June 11, 1984 to review an order of the United States Court of Appeals for the Eighth Circuit (Case No. 80-1619) dated March 12, 1982.

---

[1] See, E.g., Pravat v. INS, 662 F.2d 561 (9th Cir. 1981)(per Curiam).

TABLE OF CONTENTS

Objection to jurisdiction of the Court.....2

Statute and regulation involved.....3

Statement.....7

Reasons for denying the petition.....9

Conclusion.....19

Appendix A.....1a

Appendix B.....7a

TABLE OF AUTHORITIES

Cases:

Perez v. INS, 643 F.2d 640, 641 (9th Cir 1981).....16

Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981).....16

Sida v. INS, 655 F.2d 851 (9th Cir. 1981).....16, 18

Tong-Chen v. Attorney General F. Supp. DDC. C.A. NO. 82-0010, August 13, 1982.....18

Vargas-Gonzales v. INS, 647 F.2d 457 (5th Cir. 1981).....5, 6

Statutes and regulations:

Immigration and Nationality Act of 1952:

8 U.S.C. 1254(a)(1).....5, 6

8 C.F.R.:

Section 3.2.....14

Section 3.8.....14

Section 3.8(b).....11

Section 242.22.....12

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 83-2032

Immigration and Naturalization Service,

Petitioner

v.

Bernardo Rios-Pineda

and

Estarnilada Rios-Pineda de Rios,

Respondents

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certoirari to review the judgments of the United States Court of Appeals for the Eighth Circuit in this case, which are:

1. The opinion of the United States Court of Appeals for the Eighth Circuit. (Case No. 80-1619) Initial opinion filed on March 12, 1982. (Petitioner's Appen-

dix C)

2. The opinion of the United States Court of Appeals for the Eighth Circuit. (Case No. 82-1892) Ancillary opinion filed on November 9, 1983 (Petitioner's Appendix A)

OBJECTION TO JURISDICTION OF THE COURT

Respondents object to the jurisdiction of the Court to grant the writ of certiorari on the basis that the petition is jurisdictionally out of time with regard to the initial opinion of the United States Court of Appeals for the Eighth Circuit (Judgment entered on March 12, 1982) to the question presented in the petition (page 1), which was decided totally in the initial opinion of the Court.[2]

[2] "Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254 (a)(1) because the alien has acquired the necessary seven years "continuous physical presence"only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws."

Certainly, the petition was timely filed against the second opinion of the United States Court of Appeals for the Eighth Circuit (Case No. 82-1982 opinion filed on November 9, 1983). However, the issue raised by the petitioner in the "Question Presented" for writ of certoirari was not decided in this second ancillary opinion.[3]

STATUTE AND REGULATION INVOLVED

The mandate of the U.S. Court of Appeal's, Case No. 80-1619, initial opinion filed on March 12, 1982, which provides

[3] "In short, we find that the Board abused the discretion which remained after our remand of the case by refusing to give the petitioners a full and fair opportunity to present their evidence of extreme hardship and failing to render a reasoned decision based upon that evidence. The Board was not free to reconsider the prima facie issue, and it abused the Attorney General's discretion in denying the pet-

in the pertinent part that:

"Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

---

itioners' motion regardless of th r prima facie showing. We do not question the Board's sincerity in attempting to implement the immigration policy which languishes in our federal statutes. We do require that policy be followed to the letter and in a spirit of total fiarness to those persons who may be permantly exiled from our shores as a result of its implementation. We therefore remand to the Board with directions that it reopen the petitioners' deportation proceedings, with a full hearing before an immigration judge if requested, in order to make a reasoned determination of their eligibility for a section 1254(a)(1) suspension of deportation by virtue of the resultant extreme

In Vargas-González v. INS, 647 F.2d 457 (5th Cir 1981), the Fifth Circuit reversed a deportation decision by the Board of Immigration Appeals and remanded the proceeding so that the Board could consider the petitioner's eligibility for suspension of deportation because the seven-year continuous presence requirement under § 1254(a)(1) had been established during the pendency of the appeal. Id. at 458-459. The Court observed that the petitioner, having met the seven-year continuous presence requirement, established--'a prima facie case entitling him upon proper procedural application to reopen the case for reconsideration of his application for suspension of deportation.' Id. at 459,.

---

hardship to themselves or either of their daughters, Ana Belia or Brenda Lee."

We conclude that Bernardo and Estarnilada, like the petitioner in Vargas-González v. INS, have 'made a substantial showing that the Board should properly aford (them) relief on the basis of the additional evidence available subsequent to the initial hearing.***' Id. We accordingly reverse the Board's decision and remand for further proceedings.

III

In remanding this case to the Board for further proceedings, we direct the Board to hold this matter in abeyance for sixty days from the date of this decision. If Bernardo and Estarnilada file a proper motion to reopen within the sixty-day period, the Board shall promptly consider and rule upon their claim that they are entitled to suspension of deportation under 8 U.S.C. § 1254(a)(1). If no

motion to reopen is filed within sixty days, the Board may dismiss this matter.

Reversed and remanded."

STATEMENT

1. Petitioner did not comply with the laws applicable in this case (U. S. Court of Appeals for the Eighth Circuit, Case No. 80-1619). On the contrary, Petitioner entered a decision (See Petitioner's Appendix B)in which the B.I.A. stood up in an argument with the mandate they were supposed to obey.

Respondents, following the mandate of the U.S. Court of Appeals, filed timely a motion to reopen. (See Appendix A)

Petitioner disobeyed the mandate, provoking Respondents to file a second Petition to Review before the U.S. Court of Appeals for the Eighth Circuit, in which occassion it was raised to the U.S. Court

of Appeals how the B.I.A. totally ignored their previous mandate, the Board deciding, in open argument against the Court and without granting a hearing to discuss and decide the motion to reopen of the Respondents.

2. This Petition for a Writ of Certiorari is built upon a misrepresentation, which is that the points expressed in the Statement of the Petition were decided by the Court of Appeals for the Eighth Circuit in Case No. 82-1892, when they were not decided at that time. The facts were all decided by the mandate of the U.S. Court of Appeals for the Eighth Circuit in the Case No. 80-1619, which was consented to by the Petitioners.

3. This Petition for Writ of Certiorari is, therefore, jurisdictionally out of time with regard to the Statement of the Petition.

4. If the practice followed in this

Petition was accepted, it would imply that the flagrant denial of the mandate of the U.S. Court of Appeals for the Eighth Circuit by the Petitioner will originate a second court decision, which will correct Petitioner's failure of having consented to the first decision of the Court of Appeals among the same parties.

Petitioners could file a Petition for a Writ of Certiorari against the first mandate of the U.S. Court of Appeals for the Eighth Circuit but decided not to do it. Therefore, they have lost any further opportunity to do it as they are attempting to do through the bridge of the second opinion of the Court.

REASONS FOR DENYING THE PETITION

Since the Petitioner did not file this Petition timely against the first opinion of the U.S. Court of Appeals for the Eighth Circuit, the matters decided are "res jud-

icata."

This case was before the B.I.A. on remand from a mandate of the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the Respondents 60 days in which to properly file a motion to reopen to apply for suspension of deportation. The Respondents submitted a motion to reopen. The motion was denied by the Board's Order of May 30th., without a hearing.

In a decision dated 12-12-73, the Immigration Judge found the Respondents deportable on their own admissions to having entered without inspection on May 1, 1974. He further refused to accept the male respondent's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both Respondents' requests for voluntary departure in the exercise of discretion. Respondents' appeal

was dismissed by the Board on May 30, 1980. Respondents filed a Petition for Review on July 16, 1980. The Court of Appeals for the Eighth Circuit remanded the record because the Respondents acquired 7 years of physical presence during the pendancy of the case.

Respondents, in compliance with the Court's mandate, filed a motion to reopen simultaneously before the District Director in Omaha, Nebraska, the U.S. Immigration Judge in Denver, Colorado, and the U.S. Board of Immigration Appeals in Washington, D.C. by certified mail on 5-6-82. Respondents made the simultaneous filing at these three different offices upon the doubt that the interpretation of the Board would be according with 8 C.F.R. 3.8(b). However, the Order of the U.S. Court of Appeals for the Eighth Circuit was that the motion to reopen was filed before the Board. Facing that doubt, the most cons-

ervative criteria was to proceed to file the motion to reopen at the three indicated places, timely in each of them, that is May 6, 1982.

The B.I.A., without a hearing, decided the motion on the grounds of technicality entered in areas of anaylsis of Respondents' hardship, as well as Respondents' statutory time for suspension of deportation. In as much as these two elements were perfectly clarified in the U.S. Court of Appeals' mandate on 3-12-82, we conclude that the B.I.A. was in flagrant opposition and resistance to the mandate of the U.S. Court of Appeals for the Eighth Circuit.

According with § 242.22 of the Code of Federal Regulations, Title 8, [4] the B.I.A.,

[4] "Except as otherwise provided in this section, a motion to reopen or reconsider sahll be subject to the requirements of § 103,5 of this chapter. The Immigration judge may upon his/her own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he/she had made a decision, unless jurisdiction in the case is vested in the

in compliance with the mandate of the Court of Appeals, was forced to hold a hearing in which the Respondents would have the right to introduce evidence to support their motion and to submit arguments and

Board of Immigration Appeals under Part 3 of this chapter. An order by the Immigration judge granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under § 242.17 be granted it respondent's right to make such application was fully explained him/her by the immigration judge and he/she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of an application for adjustment of status under section 245 of the Act may be considered as a motion to reopen when the application shows new material not available or discoverable at the time of the deportation hearing. The filing of a motion under this section with an immigration judge shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the immigration judge who has jurisdiction over the motion specifically grants a stay of deportation. The immigration judge may stay deportation

brief. The B.I.A., ignoring this regulation, decided upon the motion without that hearing and, therefore, in flagrant violation of the law.

According with the Order of the U.S. Court of Appeals for the Eighth Circuit, the Respondents were granted 60 days from 3-12-82, to file a proper motion to the Board in accordance with the controlling regulations, which the U.S. Court of Appeals noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8.

Respondents properly and timely filed a motion to reopen and for suspension of deportation, which the Board denied on 7-16-82 by a majority, (Board member James p. Morris abstained from consideration of this case) without a careful and thorough

---

pending his/her determination of the motion and also pending the taking and disposition of an appeal from such determination."

(46 FR 25598, May 8, 1981)

consideration. Copy of said motion to reopen is attached as Appendix A.

The U.S. Court of Appeals for the Eighth Circuit, in its decision in Case No. 80-1619, entered on 3-12-82, determined that Respondents' specifically are persons who completed the 7 years continuous physical presence in this country during the pendency of this case; justly based that in completion of this requirement, their case should be reopened by the B.I.A.

However, the B.I.A. denied the motion to reopen its decision of 5-30-80 on the grounds that Mr. and Mrs. Rios-Pineda's case did not warrent any consideration upon the fact that they have completed the 7 year time requirement of physical presence while pendency of the judicial review of their case.

The Board's decision makes little sense and is improper, in as much as it is punishing the aliens for the reason

that they have exercised their Constitutional rights of equal protection under the law.[5]

Again, the B.I.A. has disregarded the opinion of the U.S. Court of Appeals for the Eighth Circuit, expressed in the Order entred on 3-12-82, Case No. 80-1619, in as much as said decision specifically weighed the equitable factor which entitled the aliens in this case with the requirement of extreme hardship, which are: the fact that the Rios-Pineda family included 2 school-age American citizen children who would be in fact deported if their parents were deported. Consequently, those 2 American citizen children will be forced to discontinue their education at the level offered in their country, with the discontinuance of the study in the read-

[5] Sida v. INS, 665 F.2d 851 (9th Cir. 1981), Santana-Figueroa v. INS, 644, 1354, 1357 (9th Cir. 1981), Pérez v. INS, 643 F.2d 640, 641(9th Cir. 1981)

ing and writing of their official English language and will be forced to lose the health and welfare protections to which they are entitled but not available in their parents' country of Mexico. Moreover, the psychological impact and cultural difference to Ana Belia (10 years old) and Brenda Lee (6 years old), if transplanted at their ages to a country totally unknown by them, will be a case of extreme hardship.

Specifically, the U.S. Court of Appeals for the Eighth Circuit, in its decision of 3-12-82, Case No. 80-1619, stated:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a home owner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of

Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

Respondents, to prove the extreme hardship of Mr. and Mrs. Rios-Pineda's American citizen children, introduced to the B.I.A. the following evidence:

1. Birth Certificate of Ana Belia in Omaha, Nebraska.

2. Birth Certificate of Brenda Lee in Omaha, Nebraska.

3. Report cards from the Omaha Public Schools regarding Ana Belia and Brenda Lee Rios.

The B.I.A. in their decision of 7-16-82 specifically recognized the evidential elements introduced with the motion to reopen by Respondents, however they concluded that the extreme hardship does not exist in this case with abuse of discretion.[6]

CONCLUSION

The Respondents herein oppose this Petition for a Writ of Certiorari on the basis that the Petitioner is jurisdictionally out of time plus the additional arguments expressed herein. Therefore it is respectfully requested that the writ be rejected without entering in its merits.

Respectfully submitted.

F. Román de la Campa

Román de la Campa
Attorney for Respondent

November 1984

[6] Sida v. INS, 665 F.d2 851 (9th Cir. 1981), Tong-Chen v. Attorney General, F. Supp, DDC, C.A. No. 82-0010, Aug. 13, 1982.

APPENDIX A

TO THE BOARD OF IMMIGRATION APPEALS

Bernardo Rios-Pineda, A22 733 395, husband, and Estarnilada Ramos de Rios, A22 733 397, wife, Petitioners.	*	MOTION TO RE-OPEN & CLAIM FOR SUSPENSION OF DEPORTATION

Submitted: By certified mail May 6, 1982

According with the decision of the United States Court of Appeals for the Eighth Circuit in Case No. 80-1619, filed March 12, 1982, Petitioners herein expresses to the Board as follows:

1. That in compliance with the decision above-expressed and during the 60 days period allowed by the Court, Petitioners herein file this "Motion to Reopen" this case upon the following facts:

(a) Because the 7 years statutory requirement to qualify for Suspension of Deportation pursuant to 8 U.S.C. 1254(a), which had not have e.apsed when the orig-

inal decision was entered by the Immigration Judge, the Honorable Jesse M. Sellers, on August 29, 1980. (see exhibit #1 attached), has elapsed at the time of the filing of this Motion, that is, May 7, 1982 (see exhibit #2 attached).

In effect, on page 2 of the decision above-expressed of the U.S. Court of Appeals, (see exhibit #3), Petitioners entered on May 1, 1974, in the United States. Since that time they have been continuously residing in the U.S. Therefore the 7 years statutory requirement is the new fact in which Petitioners base this Motion to Reopen.

(b) Considering the other requirements of the law, it is hereby added that Petitioners are persons of immaculate conduct, moral character and work records. Please see exhibits attached to 2, that is: statement of employer, income tax returns

1974, 75, 76, 77, 78, 80 and 81, plus the real estate contract purchasing petitioners' homestead.

(c) Finally, the extreme hardship that Petitioners' only 2 U.S. citizen children will suffer is coorborated by exhibits attached to exhibit 2, they are: birth certificates of Ana Belia (7) and Brenda Lee(3) both born and raised in Omaha, Nebraska, never having visited any other country. The oldest girl Ana Belia with her education in U.S. schools only (see Attached school report in exhibit 2).

In effect Ana Belia Rios and Brenda Lee Rios will suffer extreme hardship if their parents are deported, because, due to their ages (7 and 3 years old) will not be reasonable to stay alone in this country separated from their parents. Deporting with their parents will deprive them of their citizen rights, which among other things to receive their education in Am-

erican schools, which in the case of Ana Belia who has already 3 years in American schools, will be to interrupt said education, only in the English language, then going to re-start their education in Mexican schools in the Spanish language, retarding her educational process at a very critical time.

Moreover, the extreme hardship of Petitioners will be also psychological, when cosidering their inability to enjoy in Mexico the standards they have in 8 years of their life in the United States, according with their financial possibilities as well as their low skills and educations. This psychological effect will be worse in the petitioners' two U.S. citizen minor daughters who will be deprived of all social assistance which they might utilize if needed from the United States, if they were living in their country.

Moreover, neither the Immigration

Judge, nor this Board, in the decision of this case have objected to these other requirements regarding moral character and extreme hardship.

3. Finally, the decision of the U.S. Court of Appeals, in this case (see copy attached) in the following paragraph which we are quoting, by implication, is accepting that petitioners' hardship is extreme, by saying:

"Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974, Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

THEREFORE, petitioners request that

the Board gives consideration to this motion to reopen with exhibits, and fees, ordering that petitioners are entitled to suspension of deportation under 8 U.S.C. 1254(a)(1).

Respectfully submitted,

/s/Roman de la Campa
Roman de la Campa
Petitioners' Attorney
of Record
2219 Allan Street
Sioux City, Iowa 51103
712-258-8852

APPENDIX B

NO. 82-1894

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BERNARDO RIOS-PINEDA
ESTARNILADA RIOS-PINEDA

PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE
BOARD OF IMMIGRATION APPEALS.

BRIEF FOR PETITIONERS

STATEMENT OF THE ISSUE

Was the Board of Immigration Appeals acting properly when disobeying the Order of this Court by improperly denying the Motion to Reopen filed by Petitioners?

STATEMENT OF THE CASE

This case was before the Board of Immigration Appeals (BIA) on remand from a decision of the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the Petitioners 60 days in which to properly file a Motion to Reopen. The Motion was denied and the Board's Order of May 30, 1980 was reaffirmed.

In a decision dated December 12, 1978, the Immigration Judge found the Petitioners deportable on their own admissions to having entered without inspection on May 1, 1974. He further refused to accept the male petitioner's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both Petitioners' requests for voluntary departure in the exercise of discretion. An appeal from Petitioners was dismissed by the Board on May 30, 1980. The Board remanded the record

because the Petitioners acquired 7 years of physical presence during the pendency of the appeal.

Petitioners by Certified Mail on May 6, 1982 filed a Motion to Reopen simultaneously before the District Director in Omaha, Nebraska, the U.S. Board of Immigration Appeals in Washington, D.C. and the U.S. Immigration Judge in Denver Colorado. Petitioners made the simultaneous filing at these three different offices upon the doubt that the interpretation of the Board would be according with the 8 C.F.R. 3.8 (b). However, the Order of the Court was that the Motion to Reopen was filed before the Board. In front of that doubt, the most conservative criteria was to proceed to file the Petition to Reopen at the three indicated places, timely in each of them, that is May 6, 1982.

The Board of Immigration Appeals, of course, knowing that the grounds of tech-

nicality in the formality of the Motion were not solid to base their negative decision, decided also in areas of the analysis of Petitioners' statutory time for suspension of deportation. In as much as these two elements were perfectly decided by this Court in their Order of March 12, 1982, we conclude that the Board of Immigration Appeals is in flagrant opposition and resistance to the Order of this Court, previously mentioned.

STATEMENT OF THE FACTS

The male petitioner is a 30-year old native and citizen of Mexico. A deportation proceedings, he testified that he first entered the United States in the summer of 1972, but his suspension application states that he left the United States in March, 1974 pursuant to an administrative grant of voluntary departure and returned on May 1, 1974. The female

petitioner is a 33-year old native and citizen of Mexico who entered the United States on May 1, 1974, with her husband. The Petitioners have two United States citizen children born November 3, 1974 and February 9, 1979.

According with the Order of this Court, the Petitioners were granted 60 days from March 12, 1982, to file a proper motion to the Board in accordance with the controlling regulations which the Court noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8.

Petitioners properly and timely filed the Motion to Reopen and for Suspension of Deportation which the Board denied on July 16, 1982 by a majority, Board member James P. Morris has abstained from consideration of this case.

The Motion was denied by the Board of Immigration Appeals without a previous hearing.

-ARGUMENT-

I. MOTION TO REOPEN WAS PROPERLY FILED.

On May 6, 1982, Petitioners in compliance with the Order of this Court entered in March 12, 1982 in 80-1619 among these same parties, simultaneously filed the same Motion to Reopen in the following three different places:

1. In the office of the Board of Immigration Appeals in Falls Chruch, Virginia, 22041.

2. In the office of the District Director of the Immigration and Naturalization Service in Omaha, Nebraska, 68102.

3. In the office of the U.S. Immigration Judge in Denver, Colorado, 80202.

This conservative approach by filing the same Petition in those three differ-

ent offices at the same time was directed to prevent the possibility of denial of the Petition for the fact that it was not properly filed in the office pertinent in this case.

Therefore, the opinion of the Board regarding the place and time for the filing of this Motion must be reviewed by this Court upon consideration of the effective filing of the Motion regarding time and place.

Copy of said Motion to Reopen is hereby attached as Exhibit 1.

II. MR. AND MRS. RIOS-PINEDA HAVE MET ALL THE STATUTORY REQUIREMENTS OF GOOD MORAL CHARACTER, SEVEN YEARS OF CONTINUAL, PHYSICAL PRESENCE IN THE U.S. AND EXTREME HARDSHIP.

This Court, by its decision in Case No. 80-1619 entered, March 12, 1982 determined that appellants' specifically are persons who completed the seven years continuous physical presence in this country

during the pendency of this case; just based in that completion of this requirement, their case should be reopened by the BIA.

However, the BIA denied the motion to reopen by its decision of May 30, 1980. On the grounds that Mr. and Mrs. Rios-Pineda's case did not warrant any consideration upon the fact that they have completed the seven year time requirement of physical presence while pendency of the judicial review of their case.

The Board's decision makes little sense and is improper, is as much as it is punishing the aliens for the reason that they have exercised their constitutional rights of equal protection of the law. Sida v. INS, 665 F.2d 851 (9th Cir. 1981), Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981), Perez v. INS, 643 F.2d 640, 641 (9th Cir. 1981).

III. THE BOARD HAS DENIED APPELLANTS' MOTION TO REOPEN FOR THE REASON THAT THEY HAVE NOT PROVEN THE STATUTORY REQUIREMENT OF EXTREME HARDSHIP.

Again, the BIA has disregarded the opinion of thic court expressed in the Order entered March 12, 1982, Case No. 80-1619, in as much as said decision specifically weighed the equitable factor which entitled the aliens in this case with the requirement of extreme hardship, which are: the fact that the Rios-Pineda family included two school age American children who would be in fact deported if their parents were deported. Consequently, those two American children will be forced to discontinue their education at the level offered in their country, with the discontinuance of the study of their official English language and will be forced to loose the health and welfare protections to which they are entitled but not available in their parents' coun-

try of Mexico. Moreover, the psychological impact and cultural difference when Ana Belia (9 years old) and Brenda Lee (6 years old), be transplanted at their ages to a country totally unknown for them, will be a case of extreme hardship.

Specifically, this court in its decision of March 12, Case No. 80-1619, states as follows:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

Appellants, to prove the extreme hardship to Mr. and Mrs. Rios' American children, intorduced to the BIA as evidence the following:

1. Birth Certificate of Ana Belia in Omaha, Nebraska.
2. Birth Certificate of Brenda Lee in Omaha, Nebraska.
3. Report card from the Omaha Public school regarding Ana Belia and Brenda Lee Rios.

The BIA in the appealed decision of July 16, 1982 specifically recognized the evidential elements introduced with the motion to reopen by appellants, however concluded that the extreme hardship does not exist in this case with abuse of discretion. Sida v. INS, 665 F.2d 851 (9th Cir. 1981) Tong-Chen v. Attorney General F. Supp. DDC., C.A. No. 82-0010, August 13, 1982.

CONCLUSION

The decision entered in this case by the BIA in denying the motion to re-open, filed by appellant is in violation of 8 U.S.C. Section 1254 (a)(1) and therefore was improperly denied. The motion was timely filed, following the order of this court in Case No. 80-1619, upon the grounds that appellants, Mr. and Mrs. Rios-Pineda and their two children, Ana Belia and Brenda Lee, are persons of good moral character. Mr. and Mrs. Rios-Pineda have been in the country continuously present without interruption for seven years and their American children will be suffering a notorious extreme hardship if they are transplanted to an unknown country with a different educational, cultural level, with lower standards in life condition and with psychological impact of said transplantation at their particular ages.

Respsctfully submitted,

Román de la Campa

/s/ Román de la Campa
Roman de la Campa
2219 Allan Street
Sioux City, Iowa 51103

Office - Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 83-2032

In the Supreme Court of the United States

OCTOBER TERM, 1984

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BERNARDO RIOS PINEDA AND
ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

ROMAN DE LA CAMPA
2219 Allan Street
Sioux City, Iowa 51103
(712) 258-8852
Counsel for Respondents

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED
JUNE 11, 1984
CERTIORARI GRANTED DECEMBER 3, 1984

TABLE OF CONTENTS*

		Page
1.	Relevant Docket Entries	1
2.	Brief for Petitioners, *Rios-Pineda* v. *INS*, No. 82-1894 (8th Cir.), filed October 28, 1982	7
3.	Reply Brief, *Rios-Pineda* v. *INS*, No. 82-1894 (8th Cir.), filed December 21, 1982	13
4.	Motion to Reopen Deportation Proceedings, filed May 6, 1982	16
5.	Applications for Suspension of Deportation (without attachments)	19
6.	Brief for Petitioners, *Rios-Pineda* v. *INS*, No. 80-1619 (8th Cir.) (without attachments), filed November 29, 1980	27
7.	Petition for Review to Eighth Circuit, No. 80-1619, filed July 16, 1980	31
8.	Notice of Appeal to the Board of Immigration Appeals, filed December 20, 1978	34
9.	Excerpt of Hearing before Immigration Judge, December 12, 1978	38
10.	Orders to Show Cause, filed October 24, 1978	39
11.	Order of the Supreme Court granting certiorari	41

*The relevant administrative opinions and the opinions of the court of appeals are in the appendix to the petition for a writ of certiorari and have not been reproduced.

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 82-1894

APPEAL FROM PETITION FOR REVIEW
OF ORDER OF IMMIGRATION AND
NATURALIZATION SERVICE

BERNARDO RIOS/PINEDA
ESTARNILADA RIOS/PINEDA DE RIOS,
PETITIONERS,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Date	Filings—Proceedings
1982	
July 28	Docketed case
July 28	Petition for Review of Order of INS w/service (1)
July 28	BRIEFING SCHEDULE: Record due 8/19/82, opening brief & apndx due 9/28/82, DR (agency) due 9/28/82, responsive brief due 10/28/82, reply brief due 11/11/82.
Aug. 3	APPEARANCE FOR PETITIONER (2)
Aug. 23	APPEARANCE FOR APPELLEE. (3)
Sept. 29	MOTION of petitioner for extension of time to file brief—MOTION DENIED on 10/6/82. (4) cj
Nov. 1	*BRIEF PETITIONER* w/ser 10/29 5 copies (5) mm
Nov. 22	APPEARANCE for respondent. (6)
Nov. 19	*BRIEF APPELLEE* w/ser. 11/17 15 copies. (7) rh.
Nov. 24	TO SCREENING
Dec. 13	Received aplees. statement of issues and list of authorities.

Dec. 27	*REPLY Brief* w/ser. 12/21 5 copies. (Two more copies) (8) rh.
1983	
Feb. 18	Transferred to March session.
Mar. 16	ARGUED AND SUBMITTED TO JUDGES Heaney, Fagg & Hanson. Roman de la Campa counsel for appellant. Daniel Fromstein counsel for appellee. Recorded.
Nov. 9	OPINION BY HEANEY (PUBLISHED) 720 F.2d 529 (1983) (9)
Nov. 9	JUDGMENT: Decision of Board is reversed and remanded in accordance with opinion (10)
Nov. 21	MOTION OF RESPONDENT for ext. of time in which to file petition for rehearing. w/service (11)
Nov. 25	APPELLANT'S STATEMENT of costs w/service. (12)
Nov. 30	PETITIONER'S RESISTANCE to motion for stay of mandate and to extend time for filing petition for rehearing w/service. (13)
Dec. 1	RESPONDENT'S OBJECTIONS to PETITIONER'S BILL OF COSTS w/service (14)
Dec. 5	ORDER: RESPONDENT is granted to and including 12/23/83 to files petition for rehearing. (15)
10/7/82	5 copies of Administrative Record
Dec. 8	ORDER: PETITIONER'S resistance to respondent's motion for extension of time to file a petition for rehearing stay of mandate is denied. (16) eh
Dec. 27	RESPONDENT'S PETITION for rehearing with suggestion for rehearing en banc w/service. (17)
1984	
Jan. 13	ORDER: The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. (18)

Jan. 24	CERTIFIED COPIES OF JUDGMENT SENT TO COUNSEL.
Jan. 24	ORDER: COUNSEL for petitions shall recover the sum of $108.00 for briefs. It is further ordered by the Court that the request for reimbursement of mileage is denied. (19)
April 9	Letter indicating that an extension of time for filing a petition for writ of certiorari has been granted to and including 6/11/84. (20) cg
June 28	NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 83-2032, dated June 11, 1984. (21) cg
Dec. 6	CERTIFIED COPY OF ORDER of Supreme Court granting certiorari. (22) cg

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 80-1619

APPEAL FROM PETITION FOR REVIEW OF ORDER OF IMMIGRATION & NATURALIZATION SERVICE

BERNARDO RIOS/PINEDA, A22 733 395, HUSBAND,
ESTARNILADA RIOS/PINEDA DE RIOS A22 733 397, WIFE,
PETITIONERS,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
IMMIGRATION AND NATURALIZATION SERVICES,
OMAHA, NEBRASKA, RESPONDENT.

Date	Filings—Proceedings
1980	
July 16	Docketed Case
July 16	Petition for Review of Order of INS w/service (1)
July 21	APPEARANCE petitioners (2)
Aug. 4	APPEARANCE respondents (3)
Sept. 25	BRIEFING SCHEDULE: Brief aplnt due 10/6/80, brief aplee due 11/5/80.
Nov. 5	REV. BRIEFING SCHEDULE: Brief aplnt due 12/1/80, brief aplee due 12/30/80
Dec. 1	*Brief Petitioner* 11/29 w/serv 5 copies. (Auth to fol) (4)
Dec. 31	*Brief respondent.* w/ser. 5 copies. (Rev. State. of Is.) (5)
Dec. 31	Motion for Summary Affirmance and for Vacation of Statutory Stay. (6)
Dec. 31	Motion Suggesting Sanctions for Submission of Frivolous Petition for Review. (7)
Dec. 31	Appearance Respondent Immg. & Nat. (8)
1981	
Jan. 7	SCREENING

Jan. 14	RESISTANCE of petitioners to motion for summary affirmance and for vacation of statutory stay and RESISTANCE to motion suggesting sanctions for submission of frivolous petition for review. (9)
Jan. 28	LAW CLERK MEMO.
Feb. 9	ORDER: Respondents' motion for summary affirmance and for vacation of statutory stay is denied. Respondents' motion suggesting sanction is denied. Clerk of this Court directed to set case down for argument and submission on the merits at the March 1981 Session. (10)
Feb. 17	Transferred to March session.
Mar. 11	PETITIONERS' MOTION for partial payment of expenses. (11)
Mar. 11	ARGUED AND SUBMITTED TO Judges Heaney, Henley, McMillian. Roman de la Campa for aplnt; Daniel E. Fromstein, DJ for aplee (Recorded)
Aug. 25	TWO VOL. ADMINISTRATIVE RECORD OF THE IMMIGRATION & NAT. SERVICE (with three copies of each volume).
Mar. 16	Received 4 copies of 3/2/81 per curiam decision of the Supreme Court in *INS* v. *Wang* (No. 80-485). (12)
1982	
Mar. 12	ORDER BY HEANEY (PUBLISHED) (13)
Mar. 12	JUDGMENT: DECISION of Board of Immigration Appeals reversed and remanded. (14)
Mar. 25	RESPONDENT'S MOTION for an extension of time for filing a petition for rehearing and a stay of mandate - with service. (15)
April 1	ORDER: Respondent's motion for 30 days extension to file petition for rehearing & staying issuance of mandate is granted. (16)
Apr. 5	PENRS' BILL of Costs. (w/service) (17)
Apr. 19	RESPONDENTS' OBJECTIONS to Appellant's bill of costs - with service. (18)
May 4	CERTIFIED COPIES OF JUDGMENT SENT TO COUNSEL.

Aug. 16 ORDER: PETITIONERS to recover the sum of $367.50 for costs from respondent. (19)

No. 82-1894

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BERNARDO RIOS-PINEDA, ESTARNILDA RIOS-PINEDA,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

PETITION FOR REVIEW OF ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE PETITIONERS

STATEMENT OF THE ISSUE

Was the Board of Immigration Appeals acting properly when disobeying the Order of this Court by improperly denying the Motion to Reopen filed by Petitioners?

STATEMENT OF THE CASE

This case was before the Board of Immigration Appeals (BIA) on remand from a decision of the Eighth Circuit Court of Appeals dated March 12, 1982, ordering the Board to allow the Petitioners 60 days in which to properly file a Motion to Reopen to apply for suspension of deportation. The Petitioners have submitted a Motion to Reopen. The Motion was denied and the Board's Order of May 30, 1980 was reaffirmed.

In a decision dated December 12, 1978, the Immigration Judge found the Petitioners deportable on their own admissions to having entered without inspection on May 1, 1974. He further refused to accept the male Petitioner's application for suspension of deportation for failure to establish 7 years of continuous physical presence, and denied both Petitioners' requests for voluntary departure in the exercise of discretion. An appeal from Petitioners was dismissed by

the Board on May 30, 1980. The Petitioners filed a Petition for review of the Board's decision on July 16, 1980. The Court remanded the record because the Petitioners acquired 7 years of physical presence during the pendency of the appeal.

Petitioners by Certified Mail on May 6, 1982 filed a Motion to Reopen simultaneously before the District Director in Omaha, Nebraska, the U.S. Board of Immigration Appeals in Washington, D.C. and the U.S. Immigration Judge in Denver, Colorado. Petitioners made the simultaneous filing at these three different offices upon the doubt that the interpretation of the Board would be according with the 8CFR3.8(b). However, the Order of the Court was that the Motion to Reopen was filed before the Board. In front of that doubt, the most conservative criteria was to proceed to file the Petition to Reopen at the three indicated places, timely in each of them, that is May 6, 1982.

The Board of Immigration Appeals, of course, knowing that the grounds of technicality in the formality of the Motion were not solid to base their negative decision, decided also in areas of the analysis of Petitioner's hardship as well as Petitioner's statutory time for suspension of deportation. In as much as these two elements were perfectly decided by this Court in their Order of March 12, 1982, we conclude that the Board of Immigration Appeals is in flagrant opposition and resistance to the Order of this Court, previously mentioned.

This Court has jurisdiction over the Petition for review pursuant to Section 106(a) of the Immigration and Nationality Act (Act), 8 U.S.C. §1105a(a).

STATEMENT OF THE FACTS

The male petitioner is a 30-year-old native and citizen of Mexico. At deportation proceedings, he testified that he first entered the United States in the summer of 1972, but his suspension application states that he left the United States in March 1974 pursuant to an administrative grant of voluntary departure and returned on May 1, 1974. The female is a 33-year-old native and citizen of Mexico who entered the United States on May 1, 1974, with her husband.

The Petitioners have two United States citizen children born November 8, 1974 and February 9, 1979.

According with the Order of this Court, the Petitioners were granted 60 days from March 12, 1982, to file a proper motion to the Board in accordance with the controlling regulations which the Court noted to be 8 C.F.R. 3.2 and 8 C.F.R. 3.8.

Petitioners properly and timely filed the Motion to Reopen and for Suspension of Deportation which the Board denied in July 16, 1982 by a majority, Board member James P. Morris has abstained from consideration of this case.

The Motion was denied by the Board of Immigration Appeals without a previous hearing.

ARGUMENT

I. MOTION TO REOPEN WAS PROPERLY FILED.

On May 6, 1982, Petitioners in compliance with the Order of this Court entered in March 12, 1982 in *80-1619* among these same parties, simultaneously filed the same Motion to Reopen in the following three different places:

1. In the office of the Board of Immigration Appeals in Falls Church, Virginia. 22041.
2. In the office of the District Director of the Immigration and Naturalization Service in Omaha, Nebraska. 68201.
3. In the office of the U.S. Immigration Judge in Denver, Colorado. 80202.

This conservative approach by filing the same Petition in those three different offices at the same time was directed to prevent the possibility of denial of the Petition for the fact that it was not properly filed in the office pertinent in this case.

Therefore, the opinion of the Board regarding the place and time for the filing of this Motion must be reviewed by this Court upon consideration of the effective filing of the Motion regarding time and place.

Copy of said Motion to Reopen is hereby attached as Exhibit 1.

II. MR & MRS. RIOS-PINEDA HAVE MET ALL THE STATUTORY REQUIREMENTS OF GOOD MORAL CHARACTER, SEVEN YEARS OF CONTINUAL, PHYSICAL PRESENSE IN THE U.S. AND EXTREME HARDSHIP.

This Court, by its decision in Case No. *80-1619* entered, March 12, 1982 determined that appellant's specifically are persons who completed the seven years continuous presence in this country during the pendency of this case; just based in that completion of this requirement, their case should be reopened by the BIA.

However, the BIA denied the motion to reopen by its decision of May 30, 1980, now appealed, on the grounds that Mr. & Mrs. Ríos-Pineda's Case did not warrant any consideration upon the fact that they have completed the seven year time requirement of physical presence while pendency of the judicial review of their case.

The Board's decision makes little sense and is improper, in as much as it is punishing the aliens for the reason that they have exercised their constitutional rights of equal protection of the law *Sida* vs *INS*, 665 F.2d 850 (9th Circ. 1981), *Santana-Figueroa* vs *INS*, 644 F2d 1354, 1357 (9th Circ. 1981), *Pérez* vs *INS*, 643 F. 2d 640, 641 (9th Circ. 1981).

III. The Board has denied appellant's MOTION TO REOPEN FOR THE REASON THAT THEY HAVE NOT PROVEN THE STATUTORY REQUIREMENT OF EXTREME HARDSHIP.

Again, the BIA has disregarded the opinion of this court expressed in the order entered March 12, 1982 Case No. *80-1619*, in as much as said decision specifically weighted the equitable factor which entitled the aliens in this case with the requirement of extreme hardship, which are: the fact that the Ríos-Pineda family included two school age American children who would be in fact deported if their parents were deported. Consequently, those two American children will be forced to discontinue their education at the level offered in their country, with the discontinuance of the study in the reading and writing of their official English language and will be forced to lose the health and welfare

protections to which they are entitled but not available in their parents' country of Mexico. Moreover, the psychological impact and cultural difference when Ana Belia (8 years old) and Brenda Lee (4 years old), be transplanted at their ages to a country totally unknown for them, will be a case of extreme hardship.

Specifically, the court in its decision of March 12, 1982 Case No. *80-1619*, stated as follows:

> "Here, Bernard and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

Appellants to prove the extreme hardship of Mr. & Mrs. Ríos' American children, introduced to the BIA as evidence the following:

1. Birth certificate of Ana Belia in Omaha, Nebraska.
2. Birth certificate of Brenda Lee in Omaha, Nebraska
3. Report c[illegible]d from the Omaha Public School regarding Ana Belia and Brenda Lee Ríos.

The BIA in the appealed decision of July 16, 1982 specifically recognized the evidential elements introduced with the Motion to reopen by appellants, however concludes that the extreme hardship does not exist in this case with abuse of discretion. *Sida vs. INS*, 665 F.2d 851 (9th Circ. 1981). *Tong-Chen* v. *Att. General*. F. Supp. DDC., C.A. N°82-0010, Aug. 13, 1982.

CONCLUSION

The decision entered in this case by the BIA denying the motion to reopen, filed by appellant is in violation of 8USC-Sec. 1254(a)(1) and therefore was improperly denied. The motion was timely filed, following the order of this court in Case No. *80-1619*, upon the grounds that appellants, Mr. & Mrs. Ríos-Pineda and their two children, Ana Belia and Brenda Lee, are persons of good moral character. Mr. & Mrs. Ríos-Pineda have been in the country continuously

present without interruption for seven years and their American children will be suffering a notorious extreme hardship if they are transplanted to an unknown country with a different educational, cultural level, with lower standards in life condition and with the psychological impact of said transplantation of their particular ages.

Respectfully submitted,

/s/ Román de la Campa

ROMÁN DE LA CAMPA
2219 Allan Street
Sioux City, Iowa 51103

No. 82-1894

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BERNARDO RIOS-PINEDA AND ESTARNILADA RIOS-PINEDA,
PETITIONERS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

PETITION FOR REVIEW OR ORDER OF
THE BOARD OF IMMIGRATION APPEALS

REPLY BRIEF

STATEMENT OF THE ISSUES

Petitioners' Motion to Reopen, filed on May 6, 1982 according with the Order of this Court entered on March 12, 1982 in the Case *No. 80-1619* among the same parties herein, was erroneously denied by the Board of Immigration Appeals on July 16, 1982 with the abstention of Board member James P. Morris.

ARGUMENT

I. MOTION TO REOPEN WAS PROPERLY FILED

The BIA erred when expressing that the Motion was filed after the 60 days granted by this Court. This mistake is corroborated by the fact that the Motion was filed on May 6, 1982 by U.S. mail in Sioux City, Iowa, which date was only 54 days after March 12, 1982. The same day a proper distribution of copies of the Motion were sent to all the parties concerned in this case, that is the U.S. District Director of Immigration at Omaha, Nebraska; the U.S. Immigration Judge Jesse M. Sellers in Denver, Colorado; and Mr. Lawrence Lippe Attorney of Record of the Respondent in this case before this Court.

To corrobate the time and the form when this Motion was filed, we respectfully request to the Court to see the page number 1 of the Exhibit #1 of our Appeal Brief which expressed in the first line the following:

"Submitted by certified mail May 6, 1982."

In addition, an Affidavit expressing by the undersigned Attorney the time and the form that the Motion was filed is attached to this Reply Brief as Exhibit A.

Moreover, the BIA in their decision of July 16, 1982 which review is requested in this case on page 2 expressed as follows:

> "We are consequently unable to determine the actual date on which the motion was mailed."

Consequently, the Board was in doubt at this point with their previous statement that the Motion was not filed in a timely manner. Reasonably, the BIA did not rely on this formalistic detail to base their decision, when saying on page two:

> "Even were the motion properly filed, we would conclude that the respondents have not made a prima facie showing of extreme hardship to establish eligibility for suspension of deportation."

II. THE BOARD OF IMMIGRATION APPEALS ERRED IN DENYING TO MR. AND MRS. RIOS EXTREME HARDSHIP

In considering the request of extreme hardship, the BIA has ignored the decision of this Court in the previous action among the parties herein when this Court expressed:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

CONCLUSION

The BIA has not given careful and thorough consideration to the Motion to Reopen filed by Petitioners in violation of: *INS v. Jong Ha Wang*, 450 U.S. 139, 140-141 & n.3 (1981) and *Prapavat v. INS*, 662 F.2d 561 (9th Cir. 1981).

Therefore, the decision of the BIA must be reviewed by this Court and the case must be remanded to the BIA for the purpose that this Motion filed by Petitioners be given proper consideration according with the decision entered in Ríos-Pineda v. INS (*80-1619, U.S. Circuit of Appeals, Eighth Circuit*).

Respectfully submitted,

/s/ Román de la Campa

ROMAN DE LA CAMPA
Attorney for Petitioners
2219 Allan Street
Sioux City, Iowa 51103

TO THE BOARD OF IMMIGRATION APPEALS

BERNARDO RIOS-PINEDA, A 22 733 395, HUSBAND, AND ESTARNILADA RIOS DE RIOS, A 22 733 397, WIFE, PETITIONERS,

MOTION TO REOPEN & CLAIM FOR SUSPENSION OF DEPORTATION

Submitted: by certified mail May 6, 1982

According with the decision of the United States Court of Appeals for the Eight Circuit in case No. 80-1619, filed March 12, 1982, Petitioners herein expresses to the Board as follows:

1. That in compliance with the decision above-expressed and during the 60 days period allowed by the Court, Petitioners herein file this "Motion to Reopen" this case upon the following facts:

(a) Because the 7 years statutory requirement to qualify for Suspension of Deportation pursuant to 8 U.S.C. 1254(a), which had not have elapsed when the original decision was entered by the Immigration Judge the Honorable Jesse M. Sellers on August 29, 1980, (see exhibit #1 attached), has elapsed at the time of the filing of this Motion, that is, May 7th, 1982 (see exhibit #2 attached).

In effect, on page 2 of the decision above-expressed of the U.S. Courts of Appeals, (see exhibit #3), Petitioners entered on May 1, 1974, in the United States. Since that time they have been continuously residing in the U.S. Therefore the 7 years statutory requirement is the new fact in which Petitioners base this motion to Reopen.

(b) Considering the other requirements of the Law, it is hereby added that Petitioners are persons of immaculate conduct, moral character and work records. Please see exhibits attached to 2, that is: Statement from employer, income tax returns 1974, 75, 76, 77, 78, 80, and 81, plus the real state contract purchasing petitioner's homestead.

(c) Finally the extreme hardship that Petitioner's only 2 U.S. citizens children will suffer is corroborated by exhibits

attached to exhibit 2, they are: birth certificate of Ana Belia (7) and Brenda Lee (3) both born and raised in Omaha, Nebraska, never having visited any other country. The oldest girl Ana Belia with her education in U.S. schools only (see attached school report in exhibit 2).

In effect Ana Belia Ríos and Brenda Lee Ríos will suffer extreme hardship if their parents are deported, because, due to their ages (7 and 3 years old) will not be reasonable to stay along in this country separated from their parents. Deporting with their parents will deprive them of their citizens rights, which are among others to receive their education in American Schools, which in the case of Ana Belia who has already 3 years in American Schools, will be to interrupt said education, only in the English language, then going to re-start said education in Mexican Schools in the Spanish language, retarding her educational process at a very critical time.

Moreover, the extreme hardship of Petitioners will be also psychological; when considering their inability to enjoy in Mexico the standards they have in 8 years of their life in the United States, according with their financial possibilities as well as their low skills and educations. This psychological effect will be worst in petitioner's two U.S. citizens minor daughters who will be deprived of all social assistance which they might utilize if needed from the United States, if they were living in their country.

2. Moreover, neither the Immigration Judge, or this Board, in the decision of this case have objected to these other requirements regarding moral character and extreme hardship.

3. Finally, the decision of the U.S. Court of Appeals, in this case (see copy attached) in the following paragraph which we are quoting, by implication, is accepting that petitioner's hardship is extreme, by saying:

> "Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both Bernardo and Estarnilada's chil-

dren, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth."

THEREFORE, petitioners request that the Board, gives consideration to this motion to reopen with exhibits, and fees, ordering that petitioners are entitled to suspension of deportation under 8 U.S.C. Section 1254(a)(1).

Respectfully submitted,

/s/ Román de la Campa

ROMÁN DE LA CAMPA
Petitioner's Attorney of Records
2219 Allan Street, Sioux City, Iowa 51103
712-258-8852

Copies to:

1) U.S. Department of Immigration
106 S. 15th Street, Omaha, Nebraska 68102

2) Honorable Jesse M. Sellers
1787 Federal Office Building
Denver, Colorado 80202

3) Lawrence Lippe, Chief
General Litigation and Legal Advice Section
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

~~EXHIBIT 2~~

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Form approved.
OMB No. 43-R0424

File No. A 23 733 394

APPLICATION FOR SUSPENSION OF DEPORTATION

(Under Section 244 of the Immigration and Nationality Act)

(PLEASE READ ADVICE AND INSTRUCTIONS BEFORE FILLING IN FORM)

FEE STAMP

(1) I, the undersigned, hereby request that my deportation be suspended under the provisions of section 244 of the Immigration and Nationality Act. I believe that I am eligible for suspension of deportation because such deportation would result in extreme hardship to myself and/or to my CHILDREN ANA BELIA RIOS (7) and BRENDA LEE RIOS (3)
(Husband, wife, father, mother, son, daughter, child, children)

who ~~am/are~~ {☒ citizen(s) ☐ lawful permanent resident(s)} of the United States, and I have been physically present in the United States without any absence since MAY 1, 1974

(2a) My present true name is: (First, Middle, Last)					(2b) My name given at birth was.
BERNARDO RIOS-PINEDA					SAME
(3) I have been known by the additional names	My sex is	(Height)	(Color of eyes)	(Color of hair)	(Complexion)
NONE	MALE	5'4"	BLACK	BLACK	DARK
(4) I was born at (Place and country)	on (Month) (Day) (Year)	My nationality is (Country of which citizen or subject)			
S. Jose de la Boca, DURANGO - MEXICO	FEB - 20 - 51	MEXICAN			
(5) I now reside at (Apt. number and/or in care of)	(Number and street)	(City or town)	(State)	(ZIP Code)	
5242	So. 17th St.	OMAHA	NEB	68107	

(6) I first entered the United States under the name of (First) (Middle) (Last)	on (Month) (Day) (Year)	At (seaport, airport, or land border port)
BERNARDO RIOS-PINEDA	6 - 1971	TIJUANA - CALIFORNIA
Name of vessel or other means of conveyance	I was admitted as a (Insert visitor, crewman, transient, student, permanent resident, or other)	
NONE	VISITOR	
For a period of time to expire (Insert date or period for which admitted)	My last extension of stay in the United States expired on (date)	
NONE	N/A	

If not inspected or if entry occurred at other than a regular port, describe the circumstances as accurately as possible.
CROSSING THE BORDER CLOSE TO TIJUANA

Since the date of my first entry I departed from and returned to the United States at the following places and on the following dates. (If you have never departed from the United States since your original date of entry, insert "no departures.")

DEPARTED		RETURNED		INSPECTED AND ADMITTED (Answer Yes or No)
Port	Date (Month-Day-Year)	Port	Date (Month-Day-Year)	
TIJUANA - CALIFORNIA	3 - 74	TIJUANA - CALIFORNIA	5 74	NO

(7) During the last 10 years, I have been in the United States as listed below: (If less than 10 years, set forth the information for the period you have been in the United States.) List present address FIRST, and work back.

Street and Number - City or Town - State (Include number of hotel room, furnished room or apartment in present address)	From - Month	From - Year	To - Month	To - Year
5242 So. 17th St. Omaha NEB 68107	6	75	PRESENT	
4607 So. 33rd St. Omaha Neb	4	75	6	75
GENERAL AMERICAN'S Omaha Neb	5	74	4	75
GENERAL MECHANICS Omaha Nebr	6	71	5	74
LOS BANOS, SAN JOSE - DURANGO - MEXICO	5	70	6	71

(Use a separate sheet for additional entries)

Form I-256A
(Rev. 12-7-77)N

(8) During my residence at the places in the United States named above I was employed by the following-named persons or firms: (Begin with present employment and proceed backwards. Any periods of unemployment or school attendance should be specified.

Full Name of Employer	Address of Employer	Earnings Per Week (Approximately)	Type of Work Performed	From— Month	From— Year	To— Month	To— Year
UNION PACIFIC CO. OF OMAHA	4501 So. 36 St. OMAHA	$7.19	LABOR	MAY	74	PRESENT	
RESTAURANT OVER CROSS	CHICAGO - ILLINOIS	$64.57	LABOR	1	73	5	74

(Use a separate sheet for additional entries.)

(9) If self-employed, describe nature of business, name under which business is conducted, its address and net income derived therefrom _____

(10) I ☒ AM ☐ AM NOT MARRIED | If married, the name of my spouse is ESTARNILADA RIOS | We were married on (Month) (Day) (Year) AUG 30 71 | at (City or town) (State or country) S. José de la Boca DURANGO - MEXICO

She or he was born at (City or town) (State or country) San José de la Boca - DURANGO - MEXICO | on (Month) (Day) (Year) MAY-7-49 | and is a citizen of (Country) MEXICO

(11) (If your spouse is other than a native born United States citizen, answer the following.) She or he arrived in the United States at (City or town) TIJUANA - CALIFORNIA | on (Month) (Day) (Year) MAY-1-74 | ☐ was ☒ was not admitted for permanent residence.

was naturalized on (Month) (Day) (Year) NO | (Place naturalized) NONE

(12) I ☐ have ☒ have not been previously married: (If previously married, give facts relative to name of each prior spouse, and manner, date, and place of termination of each prior marriage) _____

(13) My present spouse ☐ has ☒ has not been previously married. (If spouse previously married, give facts relative to name of each prior spouse and manner, date, and place of termination of each prior marriage) _____

(14) My spouse ☐ is ☒ is not employed. If employed, give salary and name and address of place of employment _____

(15) The assets of myself (and my spouse), not including clothing and household necessities, are: Self (or jointly owned with spouse):

Cash, Stocks and Bonds	$ 1,000.00	Cash, Stocks and Bonds	$ ———
Real Estate	$ 12,000.00	Real Estate	$ ———
Other (Describe) HOUSEHOLD	$ 1,000.00	Other (Describe) CAR	$ 2,500.00
Total	$ 14,000	Total	$ 2,500.00

(16) I have 2 children. Give information requested in each column:

	Name	Age	Place of Birth	Now Residing at—	Citizen of	Lawful Permanent Resident of U.S.
1)	ANA BELIA RIOS	7	OMAHA-NEB	OMAHA-NEB	U.S.A	———
2)	BRENDA LEE RIOS	3	OMAHA-NEB	OMAHA-NEB	U.S.A	

The names, assets, and earnings of my children in the United States who have separate incomes are: NONE

(17) I ☐ have ☒ have not after entry into the United States acquired the status of an exchange alien.

(18) I ☐ have ☒ have not submitted yearly address reports as required by the amendment to the Alien Registration Act effective September 23, 1950, and the Immigration and Nationality Act.

(19) I ☐ have ☒ have not been the recipient of public or private relief or assistance. If you have, give full details including date, place, and amount received _____

(20) If you have served in the Armed Forces of the United States, state branch (Army, Navy, & service number, etc.) N/A

Date and place of entry on duty _____. Date of discharge _____.

Type of discharge (honorable, dishonorable, etc.) _____. I served in active duty status from _____ to _____.

(21) If male, did you register under the Selective Service (Draft) Law of 1917, 1918, 1940, 1948, 1951, or later Draft Laws? Yes ☐ No ☒

If "Yes," give date, Selective Service number, local draft board number and your last draft classification. _____

Were you ever exempted from service because of conscientious objection, alienage, or any other reason? Yes ☐ No ☒

(22) Have you ever deserted from the military or naval forces of the United States while this country was at war? Yes ☐ No ☒

(23) Have you ever left the United States or the jurisidiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? Yes ☐ No ☒

(24) List membership, past or present, in all organizations, societies, clubs, unions, and associations, whether in the United States or a foreign country, and the periods and places of such membership. Include membership in any Communist Party or organization or in any section, subsidiary, branch, affiliate, or subdivision of any such party or organization:

none

(25) I ☐ have ☒ have never (either in the United States or any other country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance.

If answer is in the affirmative in any particular, give complete information in the space immediately following _____

(Use a separate sheet for additional entries.)

(26) I can return to my country of ☒ Birth ☐ Nationality ☐ Last Residence without fear of persecution.. If unable to return to any (Check the appropriate block or blocks)

of these countries, give reasons _____

(27) I ☒ would ☐ would not be able to arrange a trip outside the United States to obtain an immigrant visa. If not, explain: _____

(28) Give the requested information about your parents, brothers, and sisters. As to residence, show street address, city, and state, if in the United States; otherwise show only country.

Name	Relationship To Me	Now Residing At	Birthplace	Citizen Of	Lawful Permanent Resident of U.S.?
Jose Rios	FATHER	MEXICO	MEXICO	MEXICO	NO
GUADALUPE RIOS	MOTHER	MEXICO	MEXICO	MEXICO	NO

IF THIS APPLICATION IS BASED ON HARDSHIP TO A PARENT OR PARENTS, QUESTIONS 29 TO 32 MUST BE ANSWERED.

(29) As to such parent who is not a citizen of the United States, give date and place of arrival in the United States including full details as to manner and terms of admission to this country _____

(30) My father ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(31) My mother ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(32) The assets of my parents (not including clothing and household necessities) are:

Assets of father consist of the following:

Cash, Stocks and Bonds	$_____
Real Estate	$_____
Other (Describe)	$_____
Total	$_____

Assets of mother consist of the following:

Cash, Stocks and Bonds	$_____
Real Estate	$_____
Other (Describe)	$_____
Total	$_____

(33) The following certificates or other documents are attached hereto as a part of this application: (Refer to instruction 2 for documents which *must be attached.*)

Nature of Document

1. MY BIRTH CERTIFICATE
2. MY MARRIAGE CERTIFICATE
3. " 2 CHILDREN BIRTH CERTIFICATES
4. " OLDER CHILD SCHOOL-CARD
5. " LETTER of EMPLOYMENT
6. " INCOME TAXES FOR 1981-80-79-78-76-75 & 74
7. " PHOTOS
8. " FEES
9. " REAL ESTATE CONTRACT PURCHASING HOMESTEAD.

(APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE)

I do swear (affirm) that the contents of the above application, with corrections numbered ( ) to ( ), and including the documents attached hereto, are true to the best of my knowledge, and that this application is now signed by me with my full, true name: So Help Me God.

Leonardo Rios
(Complete and true signature of applicant or parent or guardian)

Subscribed and sworn to before me by the above-named applicant at _____
this _____ day of _____, 19_____

_____
Immigration Judge

EXHIBIT 3

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Form approved.
OMB No. 43-R0324

File No. A22 733 397

FEE STAMP

APPLICATION FOR SUSPENSION OF DEPORTATION

(Under Section 244 of the Immigration and Nationality Act)

(PLEASE READ ADVICE AND INSTRUCTIONS BEFORE FILLING IN FORM)

(1) I, the undersigned, hereby request that my deportation be suspended under the provisions of section 244 of the Immigration and Nationality Act. I believe that I am eligible for suspension of deportation because such deportation would result in extreme hardship to myself and/or to my CHILDREN ANA BELIA RIOS (7) and BRENDA LEE RIOS (3)
(husband, wife, father, mother, unmarried child, children)

who is/are ☒ citizen(s) ☐ lawful permanent resident(s) of the United States; and I have been physically present in the United States without any absence since MAY 1, 1974

(2a) My present true name is: (First, Middle, Last) ESTARNILADA RIOS				(2b) My name given at birth was: ESTARNILADA RAMOS	
(3) I have been known by the additional names: ESTARNILADA RAMOS de RIOS	My sex is FEMALE	(Height) 5' 8"	(Color of eyes) BLACK	(Color of hair) BLACK	(Complexion) DARK
(4) I was born at (Place and country) S. Jose de la Boca, Durango-MEXICO	on (Month) (Day) (Year) MAY-7-49	My nationality is (Country of which citizen or subject) MEXICAN			
(5) I now reside at (Apt. number and/or in care of) 5242 So. 17th. St.	(Number and street) OMAHA	(City or town) NEB	(State) 68107	(ZIP Code)	

(6) I first entered the United States under the name of (First) (Middle) ESTARNILADA RAMOS de RIOS (Last)	on (Month) (Day) (Year) MAY-1-74	At (seaport, airport, or land border port) TIJUANA-CALIFORNIA
Name of vessel or other means of conveyance NONE	I was admitted as a (Insert visitor, crewman, transient, student, permanent resident, or other) NONE	
For a period of time to expire (Insert date of period for which admitted) NONE	My last extension of stay in the United States expired on (date) N/A	

If not inspected or if entry occurred at other than a regular port, describe the circumstances as accurately as possible
CROSSING THE BORDER CLOSE TO TIJUANA

Since th date of my first entry I departed from and returned to the United States at the following places and on the following dates: (If you have never departed from the United States since your original date of entry, insert "no departures.")

DEPARTED		RETURNED		INSPECTED AND ADMITTED (Answer Yes or No)
Port	Date (Month-Day-Year)	Port	Date (Month-Day-Year)	
NONE DEPARTURE	—	NONE	—	—

(7) During the last 10 years, I have been in the United States as listed below: (If less than 10 years, set forth the information for the period you have been in the United States.) List present address FIRST, and work back.

Street and Number-City or Town-State (Include number of hotel room, furnished room or apartment in present address.)	From- Month	From- Year	To- Month	To- Year
5242 So. 17th. St.- OMAHA NEB 68107	6	78	PRESENT	
4607 So 22th St.- OMAHA NEB	4	75	6	78
Several APPARTMENTS OMAHA NEB	5	74	4	75
LOS BRAZILES. S. JOSE DURANGO MEXICO	5	72	5	74

(Use a separate sheet for additional entries.)

Form I-356A
(Rev. 12-7-77)N

BEST AVAILABLE COPY

(8) During my residence at the places in the United States named above I was employed by the following-named persons or firms: (Begin with present employment and proceed backwards. Any periods of unemployment or school attendance should be specified.

Full Name of Employer	Address of Employer	Earnings Per Week (Approximately)	Type of Work Performed	From— Month	From— Year	To— Month	To— Year
NONE				MAY	74	PRESENT	
ONLY HOUSEWIFE	WORKING IN MY HOME						

(Use a separate sheet for additional entries.)

(9) If self-employed, describe nature of business, name under which business is conducted, its address and net income derived therefrom _____

(10) I ☒ AM ☐ AM NOT MARRIED. If married, the name of my spouse is BERNARDO RIOS. We were married on (Month) (Day) (Year) AUG-30-71 at (City or town) S. José de la Boca (State or country) DURANGO, MEXICO.

Whether he was born at (City or town) S. José de la Boca - Durango - MEXICO (State or country) on (Month) (Day) (Year) AUG-30-71 and is a citizen of (Country) MEXICO

(11) (If your spouse is other than a native born United States citizen, answer the following.) She or he arrived in the United States at (City or town) TIJUANA-CALIFORNIA on (Month) (Day) (Year) 6- 71 ☐ was ☒ was not admitted for permanent residence.

was naturalized on (Month) (Day) (Year) none (Place naturalized) none

(12) I ☐ have ☒ have not been previously married: (If previously married, give facts relative to name of each prior spouse, and manner, date, and place of termination of each prior marriage) _____

(13) My present spouse ☐ has ☒ has not been previously married. (If spouse previously married, give facts relative to name of each prior spouse and manner, date, and place of termination of each prior marriage) _____

(14) My spouse ☒ is ☐ is not employed. If employed, give salary and name and address of place of employment $2.00 per hour - UNION PACKING CO. of OMAHA. - 4501 So. 30th St. OMAHA. - NEB. -

(15) The assets of myself (and my spouse), not including clothing and household necessities, are: Self (or jointly owned with spouse):

Cash, Stocks and Bonds	$ —	Cash, Stocks and Bonds	$ 1,000.00
Real Estate	$ —	Real Estate	$ 12,000.00
Other (Describe) Car	$ 5,000.00	Other (Describe) household	$ 1,000.00
Total	$ 5,000.00	Total	$ 14,000.00

(16) I have 2 children. Give information requested in each column:

Name	Age	Place of Birth	Now Residing at—	Citizen of	Lawful Permanent Resident of U.S.
1) ANABELIA RIOS	7	OMAHA. NEB	OMAHA. NEB	U.S.A.	—
2) BRENDA LEE RIOS	3	OMAHA. NEB	OMAHA. NEB.	U.S.A	—

The names, assets, and earnings of my children in the United States who have separate incomes are: NONE

(17) I ☐ have ☒ have not after entry into the United States acquired the status of an exchange alien.

(18) I ☐ have ☒ have not submitted yearly address reports as required by the amendment to the Alien Registration Act effective September 23, 1950, and the Immigration and Nationality

(19) I ☐ have ☒ have not been the recipient of public or private relief or assistance. If you have, give full details including date, place, and amount received _____

(20) If you have served in the Armed Forces of the United States, state branch (Army, Navy, & service number, etc.) NO

Date and place of entry on duty _____. Date of discharge _____.

Type of discharge (honorable, dishonorable, etc.) _____. I served in active duty status from _____ to _____.

(21) If male, did you register under the Selective Service (Draft) Law of 1917, 1918, 1940, 1948, 1951, or later Draft Laws? Yes ☐ No ☒

If "Yes," give date, Selective Service number, local draft board number and your last draft classification. _____

Were you ever exempted from service because of conscientious objection, alienage, or any other reason? Yes ☐ No ☒

(22) Have you ever deserted from the military or naval forces of the United States while this country was at war? Yes ☐ No ☒

(23) Have you ever left the United States or the jurisidiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? Yes ☐ No ☐

(24) List membership, past or present, in all organizations, societies, clubs, unions, and associations, whether in the United States or a foreign country, and the periods and places of such membership. Include membership in any Communist Party or organization or in any section, subsidiary, branch, affiliate, or subdivision of any such party or organization:

NONE

(25) I ☐ have ☒ have never (either in the United States or any other country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance.

If answer is in the affirmative in any particular, give complete information in the space immediately following _____

(Use a separate sheet for additional entries.)

(26) I can return to my country of ☒ Birth ☐ Nationality ☐ Last Residence without fear of persecution. If unable to return to any of these countries, give reasons _____

(Check the appropriate block or blocks)

(27) I ☒ would ☐ would not be able to arrange a trip outside the United States to obtain an immigrant visa. If not, explain: _____

(28) Give the requested information about your parents, brothers, and sisters. As to residence, show street address, city, and state, if in the United States; otherwise show only country.

Name	Relationship To Me	Now Residing At:	Birthplace	Citizen Of	Lawful Permanent Resident of U.S.?
ROSARIO RAMOS	Father	MEXICO	MEXICO	MEXICO	—
HILARIA RAMOS	MOTHER	MEXICO	MEXICO	MEXICO	—

IF THIS APPLICATION IS BASED) HARDSHIP TO A PARENT OR PAREN' QUESTIONS 29 TO 32 MUST BE ANSWERED.

(29) As to such parent who is not a citizen of the United States, give date and place of arrival in the United States including full details as to manner and terms of admission to this country _____

(30) My father ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(31) My mother ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(32) The assets of my parents (not including clothing and household necessities) are:

Assets of father consist of the following:

Cash, Stocks and Bonds	$_____
Real Estate	$_____
Other (Describe)	$_____
Total	$_____

Assets of mother consist of the following:

Cash, Stocks and Bonds	$_____
Real Estate	$_____
Other (Describe)	$_____
Total	$_____

(33) The following certificates or other documents are attached hereto as a part of this application: (Refer to instruction 2 for documents which must be attached.)

Nature of Document

1. MY BIRTH CERTIFICATE
2. " MARRIAGE CERTIFICATE
3. " 2 CHILDREN BIRTH CERTIFICATE
4. " OLDER CHILD SCHOOL-CARD
5. " PHOTO
6. " FEES
7. INCOME TAXES FOR 1981-80-79-78-77-76-75 & 74
8. " REAL ESTATE CONTRACT PURCHASING HOMESTEAD

(APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE)

I do swear (affirm) that the contents of the above application, with corrections numbered ( ) to ( ), and including the documents attached hereto, are true to the best of my knowledge, and that this application is now signed by me with my full, true name: So Help Me God.

Estanislada Rios
(Complete and true signature of applicant or parent or guardian)

Subscribed and sworn to before me by the above-named applicant at _____

this _____ day of _____, 19_____

_____
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1619

BERNARDO RIOS-PINEDA AND
ESTARMILADA RAMOS DE RIOS
I&NS# A22-733-395/397.
PETITIONERS.

vs.

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICES
RESPONDENT

PETITION FOR REVIEW OF ORDER
ENTERED BY THE BOARD OF IMMIGRATION APPEALS

BRIEF OF PETITIONERS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

LACK OF SUBSTANTIAL, REASONABLE EVIDENCE TO SUPPORT THE ADMINISTRATION DECISIONS.

II.

ERRORS OF LAW. (BASED ON AN INCORRECT INTERPRETATION OF LAW)

STATEMENT OF THE CASE

The parties seeking review are husband and wife. Both of them are presently in the United States territory at this time.

The Respondent is the Immigration and Naturalization Services with seat in Omaha, Nebraska.

The decisions which reviews are requested in this Petition are those entered by the Board of Immigration Ap-

peals on May 30, 1980 regarding the Petitioners, in which decisions an order was entered, as wit:

ORDER: The appeal is dismissed.

The Board of Immigration Appeals in this case upheld the decision entered in this case by the Honorable Immigration Judge, and therefore the following violations of law have been committed:

1. That the decision in the case was based only on the respondent's testimony, which was obtained without advising him of his right to remain silent;

2. That at the time of the trial he was in "custody", and his appearance was "mandatory, not voluntary";

3. That the Immigration Judge's decision violated the "Miranda Rules" and is consequently a "flagrant violation" of the 4th Amendment to the United States Constitution.

I.

LACK OF SUBSTANTIAL, REASONABLE EVIDENCE TO SUPPORT THE ADMINISTRATIVE DECISIONS.

The Honorable Immigration Judge in this case, at the time he interrogated petitioners, he failed prior to ask any questions, to give the "Miranda Warnings", with flagrant violation of the case of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). All the evidence in this case is limited to the interrogation of Petitioners, therefore, following the rules of the "fruits of the poisoned tree", the evidence obtained must be excluded in this case.

II.

ERRORS OF LAW. (BASED ON AN INCORRECT INTERPRETATION OF LAW)

Petitioners are the parents of two American children named Ana Belia Ríos (6) and Brenda Lee Ríos (1). Two birth certificates are hereby attached as Exhibit A & B.

The appeal decision clearly affected the life of beneficiaries' daughters who are American Citizen by birth. They both were born in Omaha, Nebraska, respectively on 11-8-74 and 2-9-79. The former will interrupt her education in her country if her parents were deported.

Mr. and Mrs. Ríos deportation, will be a de-facto deportation of their two children U.S. citizens, which is repug-

nant to our legal and constitutional system. (*Acosta* v. *INS*, U.S. Dist. Court, NJ Case No. 76-709; Fitte 28 U.S.C. Sec 2201; cf. Wright Federal Courts Sec 100-449). (5 U.S.C. sec 706(2)(B) *Aalund* v. *Marshall* 461 F2d 710, 714 (5th Cir. 1972). *Gonzalez Cuevas* v. INS, 515 F2d, 1222, 1224 (5th Circuit).

According with *Transmittal Memo No. 89, INS September 20, 1978*, deferred action OI 103.1(a)(ii), has been modified to add "undue hardship" to the criteria which may be considered in determining whether a case shall be recommended for deferred action on Form G-312.

III.

The Honorable Immigration Judge has erred in the application of the Immigration Law by holding that the main Petitioner, Mr. Bernardo Ríos, who has been a resident of the U.S. for more than 7 years has not been continuously physically present in the U.S. for the required period of seven years because of a very nonmeaningful interuption in 1974. With this interpretation, the decision has violated the case of *Fleuti* v. *Rosenburg* 374 U.S. 449, L. ED 2nd. 1000, 83 S. CT. 1804 (1963).

CONCLUSION

Petitioners Mr. and Mrs. Bernardo Ríos with more than seven years of residency in the U.S. as honorable members of our labor force, with an immaculate conduct, head of an exemplary family, must be recognized as persons whose deportations should be suspended according with Section 244 of the INA (8 U.S.C. 1254).

Moreover, Petitioners' children Ana Belia Ríos (6 years old) and Brenda Lee Ríos (1 years old) will be deprived of their U.S. Citizenship as a derivative inevitable effect if deportation of their parents were sustained by this Court.

Therefore, it is respectfully requested that this honorable Court in review of the appealed decision, order that deportation against petitioners be suspended.

Respectfully submitted,

/s/ Román de la Campa

ROMÁN DE LA CAMPA
2219 Allan St.
Sioux City, IA 51103
PH: (712) 258-8852
Attorney for Petitioners

Certified 11-29-80
/s/ Román de la Campa

ROMÁN DE LA CAMPA

TO THE UNITED STATES COURT OF APPEALS
FOR THE 8TH CIRCUIT

No. 80-1619

BERNARDO RIOS-PINEDA, A22 733 395, HUSBAND
ESTARNILADA RAMOS DE RIOS, A22 733 397, WIFE
PETITIONERS

vs.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION
AND NATURALIZATION SERVICE,
IMMIGRATION AND NATURALIZATION SERVICES,
OMAHA, NEBRASKA.
RESPONDENTS

PETITION FOR REVIEW

(Filed July 16, 1980)

COMES NOW PETITIONERS, and expressed to the Court:

The parties seeking review are 2 members of the Rios family, husband and wife. Both are presently in the United States territory.

The Respondents are 1) the U.S. Department of Justice, Immigration and Naturalization Service and 2) the Immigration and Naturalization Services with seat in Omaha, Nebraska.

The decision which review is requested in this Petition is that entered by the Board of Immigration Appeals on May 30, 1980 regarding the Petitioners' appeal from a decision of the Immigration Judge dated December 12, 1978 in which decision an order was entered, as wit:

"ORDER; The appeal is dismissed."

The decision which review is here requested, is a final order reviewable only by way of direct review of the United States Court of Appeals via a Petition for Review, accord-

ing with the construction of Section 242(b) of the INA (8 U.S.C. 1252) and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99L. Ed. 898 (1955).

SCOPE OF REVIEW

It is respectfully requested that this Honorable Court review the order above mentioned as to the following three issues:

I

a) Lack of substantial, reasonable evidence to support the administrative decision.

II

b) errors of law. (based on an incorrect interpretation of law).

III

c) unfair procedure. (Constitutional issues).

PREVIOUS JUDICIAL PROCEEDINGS

It is herein expressed by Petitioners, that the order requested for review has not been previously upheld in any previous judicial proceedings.

According with Rule 15(a) Federal Rules of Appellate Procedure, for this Petition a short form has adopted by Petitioners herein. The main issue to review, will consist in the suspension of deportation denied to petitioners because of their physical presence. However, any and all the items of defense alleged before the U.S. Immigration Judge, and denied in the decision herein requested for review, must be subject to said review by the Honorable Court.

THEREFORE, Petitioners pray that the orders abovementioned issued by the Board of Immigration Appeals, be reviewed by this Honorable Court, regarding the three scopes referred above and regarding all the issues raised in said orders, within the jurisdiction of this Court, in which Petitioners are resident. That said orders must be reversed and remanded to the Immigration and Naturalization Service, with the findings that Petitions are entitled to suspen-

sion of the petition due to their residence in United States territory for more than 7 years.

/s/ Roman de la Campa

ROMAN DE LA CAMPA
Attorney for Petitioners
2219 Allan St.
Sioux City, Iowa 51103
Phone: 712/258-8852

Subscribed and sworn to before me, Sioux City, Iowa, JULY 14, 1980.

/s/ _____
Notary Public.

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

Immigration and Naturalization Service
1008 Federal Office Building
106 South 15th Street
Omaha, Nebraska 68102

File No. A 22 733 395
A 22 733 397

In the Matter of:
Mr. Bernardo Rios-Pineda
and
Mrs. Estarnilada Ramos de Rios
5242 South 17th Street
Omaha, Nebraska 08107

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated December 12, 1978, in the above entitled case.

2. Briefly, state reasons for this appeal.

A. The Appealed decision clearly affected the deportation of beneficiaries' infant daughter who is an American citizen: Ana Belia-Ríos, who was born in the city of Omaha, state of Nebraska, U.S.A. on November 8, 1974, therefore 4 years old. This is contrary to constitutional right of said American citizen because she will be forced to leave with her parents.

B. Violation of Section 2-12(C) of the Immigration Law, because Mr. Ríos has resided in the U.S. for a continual period of 7 years and is entitled to apply for a waiver of excludability.

C. Because Form I-114 has been filed before the Immigration Office and Forms MA-50 A and B are already filed before the Nebraska Labor Department pending decision.

D. Because Mrs. Ríos is pregnant at the present time and the expected date of confinement is January 15, 1979. Reasonably, she should not travel.

3. I do desire oral argument before the Board of Immigration Appeals in Washington, D.C.

4. I am filing a separate written brief or statement.

/s/ Bernardo Rios
BERNARDO RIOS
Signature of Appellant (or attorney or representative)

/s/ Estarnilada Rios
ESTARNILADA RIOS

/s/ Roman de la Campa
ROMAN DE LA CAMPA

DECEMBER 20, 1978

Roman de la Campa
Attorney at Law
2219 Allan St.
Sioux City, Iowa 51103

Board of Immigration Appeals

File No. A22 733 395
A22 733 397

In the matter of
Mr. Bernardo Ríos-Pineda
and
Mrs. Estarnilada Ramos de Rios
5242 South 17th St.
Omaha, NE 68107

BRIEF OF STATEMENT

I

The order of deportation in this case is contrary to the U.S. Constitution Equal Protection Rights with respect to the infant daughter of beneficiaries, Ana Belia-Ríos, in that she will be forced to leave with her parents.

II

Beneficiaries' daughter, Ana Belia-Ríos, a 4-year old girl will be affected, deprived of the benefits of her American citizenship if her parents are deported, specifically the right to have her parents with her in this country. Ana will suffer this detriment only because her parents are aliens, and therefore will suffer invidious discrimination on the basis of her national origin. This is a Fifth Amendment claim.

III

The Fourteenth Amendment of the U.S. Constitution, Section I, in relation to the Civil Rights Act of 1866, No. 14 Stat. 12-7; *U.S.* v. *Won Kim Ark*, 169 U.S. 649. A child born in the U.S. becomes a citizen of the U.S. As at birth, Ana Belia-Ríos became a citizen of the U.S., that citizenship must be deemed to continue unless her voluntary action which is not possible in this case due to her minority. The appealed decision however is a *de facto* deprivation of citizenship to her. This result is repugnant to the Constitution, by denying to Ana Belia-Ríos the right to remain in the U.S. A 4-year old girl cannot enjoy her educational, spiritual and economic benefits which our society affords unless she is with her parents.

IV

Beneficiaries in this case are law-abiding and self-supporting. They are also home owners and good members of this community. They have never committed any illegal or anti-social activity. Therefore, the appealed decision erroneously follows irrelevant standards instead of exercising its discretion under the applicable statute Section 2-12(C) of the Immigration Law upon the 7 years of residency in this country of the beneficiaries without any legal interruption.

V

Aliens have the right not to bear witness against oneself and not to incriminate themselves under the Fifth Amendment. *Kim* v. *Rosenburg*, 363 U.S. 405 (1960). In this instance case the Honorable Immigration Judge at the time of the hearing interrogated the beneficiaries; nevertheless, they specifically decline, with, violation of said principle.

VI

The order of Show-Cause in this instance instant case was issued extemporaneously, because at the time was pending by the Immigrations Director the decision in Form I-114 related to Forms MA 50A and B filed before the Nebraska Labor Department. This point raised at the time of the hearing was overruled by the Honorable Judge, which confirmed the Director order of Show-Cause and in that way invalidated the procedure including the decision appealed.

Respectfully submitted

/s/ Román de la Campa
ROMÁN DE LA CAMPA
Attorney for Appellants

Sioux City, IA DECEMBER 22, 1978

EXCERPT FROM HEARING BEFORE IMMIGRATION JUDGE

December 12, 1978

[87] IMMIGRATION JUDGE

Mr. de la Campa do I hear an application for voluntary departure in lieu of deportation?

ATTORNEY

Your honor, I'm going to submit to court the application that according to the discretion of (unint.) under the circumstances of the . . . the character and good conduct of the manner . . . of the . . . Mr. Rios and Mrs. Rios, and besides they have a son who is an American citizen, they are expecting another one who is going to be born here in about a month. (unint.) only on the point that the . . . Mr. Rios have been at the same employment in the city of Omaha at . . . at the Union Packing Company which has already filed application at the Immigration Office in Omaha to obtain him labor certificate. Now requesting a visa for him (unint.) and under the point that he is needed in that plant making a kind of (unint.) work there is not any other person in Omaha who can replace him. An um, also in consideration that Mr. Rios having a residence of the United States for a period of time of seven years that the Order of Deportation be . . . state [stayed??] until the time that we can prove the seven years residence or the visa petition be a . . . granted.

IMMIGRATION JUDGE

And what period of time are you asking for, sir?

[88] ATTORNEY

(unint.)

IMMIGRATION JUDGE

Until he gets affirmative relief approved?

ATTORNEY

That's okay, yeah.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

File No. A22 733 395

UNITED STATES OF AMERICA:

In the Matter of:
Bernardo Rios-Pineda
5242 S. 17th
Omaha, Nebraska, RESPONDENT

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico,
3. You entered the United States at San Ysidro, California on or about May 1, 1974;
4. At that time you were not inspected by the United States Immigration Officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 1008 Federal Office Bldg., 106 South 15th Street, Omaha, Nebraska on November 14, 1978 at 9:00 am, and show cause why you should not be deported from the United States on the charge(s) set forth above.

/s/ _____
District Director, Omaha, Nebraska

Dated: OCTOBER 24, 1978

cc: ATTORNEY

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

---

File No. A22 733 397

UNITED STATES OF AMERICA:

In the Matter of
Estarnilada Ramos de Rios
5242 S. 17th, Omaha, Nebraska

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico,
3. You entered the United States at or near San Ysidro, California on or about May 1, 1974;
4. At that time you were not inspected by the United States Immigration Officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 1008 Federal Office, Bldg., 106 15th Street, Omaha, Nebraska on November 14, 1978 at 9:30 am, and show cause why you should not be deported from the United States on the charge(s) set forth above.

/s/ _____
District Director, Omaha, Nebraska

Dated: OCTOBER 24, 1978

cc: Attorney

Supreme Court of the United States

No. 83-2032

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

BERNARDO RIOS-PINEDA AND ESTARNILADA
RIOS-PINEDA DE RIOS

ORDER ALLOWING CERTIORARI. Filed December 3, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 83-2032

In the Supreme Court of the United States

OCTOBER TERM, 1984

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA

AND

ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

JAMES A. HUNOLT
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Attorney General and his delegates have discretion to deny an alien's motion to reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 U.S.C. 1254(a)(1) because the alien has acquired the necessary seven years' "continuous physical presence" only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute and regulation involved	2
Statement	3
Summary of argument	11
Argument:	
The Attorney General has discretion to decline to reopen deportation proceedings when the alien has become eligible for the requested underlying discretionary relief only by filing frivolous appeals and has in other ways exhibited disregard for the immigration laws	15
A. The Attorney General has broad discretion in considering whether to grant a motion to reopen deportation proceedings for the purpose of considering an application for suspension of deportation	17
B. The BIA did not abuse its discretion in declining to reopen respondents' deportation proceedings	22
1. The BIA's decision not to reopen the deportation proceedings was justified by the fact that respondents had qualified for suspension of deportation only by filing frivolous appeals	23
a. Respondents' appeals were frivolous	23
b. The court of appeals asserted no justification for respondents' appeals other than to delay deportation long enough for them to qualify for suspension relief	27

Argument—Continued: Page

c. The BIA acted well within its authority in denying the motion to reopen because of respondents' frivolous appeals 29

2. The BIA's decision not to reopen the deportation proceedings was justified by respondents' repeated flouting of the immigration laws 36

Conclusion 40

TABLE OF AUTHORITIES

Cases:

Acosta v. *Gaffney*, 413 F. Supp. 827, rev'd, 558 F.2d 1153 ..... 6, 24
Agustin v. *INS*, 700 F.2d 564 31
Arkadelphia Milling Co. v. *St. Louis S.W. Ry.*, 249 U.S. 134 32
Balani v. *INS*, 669 F.2d 1157 ..... 31, 33
Barrargan-Sanchez v. *Rosenberg*, 471 F.2d 758 27
Batoon v. *INS*, 707 F.2d 399 11
Bowes v. *District Director*, 443 F.2d 30 25
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 18
Carrete-Michel v. *INS*, 749 F.2d 490 35-36
Cass v. *United States*, 483 F.2d 220, aff'd, 417 U.S. 72 32
Cervantes v. *INS*, 510 F.2d 89 24
Chae Kim Ro v. *INS*, 670 F.2d 114 36
Der-Rong Chour v. *INS*, 578 F.2d 464, cert. denied, 440 U.S. 980 31
Encisco-Cardozo v. *INS*, 504 F.2d 1252 24
Estelle v. *Dorrough*, 420 U.S. 534 37
Faustino v. *INS*, 432 F.2d 429, cert. denied, 401 U.S. 921 6
Fidelity Federal Savings & Loan Ass'n v. *De la Cuesta*, 458 U.S. 141 18
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 18
Foti v. *INS*, 375 U.S. 217 21
Gonzalez-Cuevas v. *INS*, 515 F.2d 1222 24

Cases—Continued: Page

Heitland v. *INS*, 551 F.2d 495, cert. denied, 434 U.S. 819 27
Hibbert v. *INS*, 554 F.2d 17 31
INS v. *Bagamasbad*, 429 U.S. 24 21
INS v. *Chadha*, No. 80-1832 (June 23, 1983) 22
INS v. *Lopez-Mendoza*, No. 83-491 (July 5, 1984) 25
INS v. *Phinpathya*, No. 82-91 (Jan. 10, 1984) ..... *passim*
INS v. *Wang*, 450 U.S. 139 ..... *passim*
Jay v. *Boyd*, 351 U.S. 345 ..... 12, 21, 22
Lam Chuen Ching v. *INS*, 467 F.2d 644 31
LeBlanc v. *INS*, 715 F.2d 685 ..... 31, 33
Lincoln Gas & Electric Co., Ex parte, 256 U.S. 512 32
Lopez-Telles v. *INS*, 564 F.2d 1302 25
Luna v. *INS*, 709 F.2d 126 38
Mamanee v. *INS*, 566 F.2d 1103 24
Marcello v. *INS*, 694 F.2d 1033, cert. denied, 462 U.S. 1132 ..... 20, 22
Mendez v. *Major*, 340 F.2d 128 24
Men Keng Chang v. *Jiugni*, 669 F.2d 275 37
Molinaro v. *New Jersey*, 396 U.S. 365 37
Moore v. *INS*, 715 F.2d 13 37
Oum v. *INS*, 613 F.2d 51 31
Pang Kin Fung v. *INS*, 663 F.2d 417 37
Pauls v. *Seamans*, 468 F.2d 361 32-33
Ramirez-Gonzalez v. *INS*, 695 F.2d 1208 37
Ramos v. *INS*, 695 F.2d 181 21
Ravancho v. *INS*, 658 F.2d 169 36
Rubio de Cachu v. *INS*, 568 F.2d 625 6
Schieber v. *INS*, 520 F.2d 44 31
Segura-Viachi v. *INS*, 538 F.2d 91 27
Shin v. *INS*, No. 84-1097 (D.C. Cir. Dec. 14, 1984) 18, 38
Sida v. *INS*, 665 F.2d 851 ..... 36, 38
United States v. *Tateo*, 377 U.S. 463 32
Vargas-Gonzalez v. *INS*, 647 F.2d 457 7
Villena v. *INS*, 622 F.2d 1352 ..... 19, 36
Wang v. *INS*, 622 F.2d 1341, rev'd, 450 U.S. 139 34

Constitution, statutes and regulations:	Page
U.S. Const. Amend. V	5, 25, 26
Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1101(a)(15)(H)	4
8 U.S.C. 1105a(a)(3)	6, 26
8 U.S.C. 1182(c) (§ 212(c))	5, 6, 24, 25
8 U.S.C. 1251(a)(2)	3
8 U.S.C. 1252 (§ 242)	17
8 U.S.C. 1254(a)	2
8 U.S.C. 1254(a)(1)	4, 10, 20
8 U.S.C. 1254(c)	22
8 U.S.C. 1254(d)	22
8 U.S.C. 1254(e)	5
Ch. 439, § 20, 54 Stat. 672	20
Ch. 477, § 244, 66 Stat. 214	21
Pub. L. No. 87-885, § 4, 76 Stat. 1248	21
8 C.F.R.:	
Section 2.1	16
Section 3.1	16
Section 3.2	2, 12, 17, 30
Section 3.6(a)	5, 23
Section 3.8	17, 30
Section 3.8(a)	8
Section 103.1(n)	25
Section 103.5	30
Section 214.2(h)(3)(i)	4
Section 242.1(a)	25
Section 242.16	6, 26
Section 242.22	30
Miscellaneous:	
S. Rep. 1137, 82d Cong., 2d Sess. (1952)	20, 39

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2032

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

BERNARDO RIOS-PINEDA

AND

ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 720 F.2d 529. The initial opinion of the court of appeals (Pet. App. 16a-20a) is reported at 673 F.2d 225. The opinions of the Board of Immigration Appeals (Pet. App. 11a-15a, 21a-24a) are not reported. The decision of the immigration judge (Pet. App. 25a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on November 9, 1983. A petition for rehearing was denied on January 13, 1984 (Pet. App. 32a). On April 4, 1984, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 11, 1984. The petition was filed on that date and was granted on December 3, 1984 (J.A. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

8 U.S.C. 1254(a) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien * * * who applies to the Attorney General for suspension of the deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of Mexico. Bernardo Rios-Pineda unlawfully entered the United States in the summer of 1972 (Pet. App. 17a). In early 1974, he returned to Mexico under threat of deportation (*id.* at 12a, 17a, 27a). Two months later, on May 1, 1974, both respondents entered the United States without inspection, in violation of 8 U.S.C. 1251(a)(2) (Pet. App. 2a, 12a, 17a, 25a-26a). Respondents effected this entry with the assistance of an alien smuggler, whom they paid about $450 for his services (*id.* at 27a-28a).

Subsequently, Mr. Rios-Pineda was apprehended by officers of the Immigration and Naturalization Service (INS) and was granted permission to return voluntarily to Mexico in lieu of deportation (Pet. App. 28a). Although given at least two extensions of time to depart, Mr. Rios-Pineda did not do so (*ibid.*). The INS thereupon instituted deportation proceedings against both respondents in October 1978 by issuing orders to show cause, which alleged that respondents entered the country without inspection near San Ysidro, California, on or about May 1, 1974 (*id.* at 25a-26a; J.A. 39-40).

At the deportation hearing in December 1978, respondents, through counsel, admitted the allegations

contained in the orders to show cause and conceded deportability (Pet. App. 22a, 25a-26a; R. 85-86).[1] In response to the immigration judge's suggestion that they apply for voluntary departure in lieu of deportation, respondents, through counsel, orally requested relief from deportation, alleging that they had one citizen child and were expecting a second child, that Mr. Rios-Pineda was employed, and that an application for labor certification (see 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. 214.2(h)(3)(i)) had been filed on his behalf (Pet. App. 26a-27a; J.A. 38). Respondents' counsel also suggested that Mr. Rios-Pineda had seven years' continuous presence in the United States (J.A. 38) and should therefore be considered for suspension of deportation under 8 U.S.C. 1254(a)(1), but inquiries by the immigration judge at the hearing clearly established that the seven-year requirement had not been satisfied (R. 89-94).

The immigration judge ordered respondents deported to Mexico (Pet. App. 25a-30a). He ruled that Mr. Rios-Pineda was ineligible for suspension of deportation because he had not attained the required seven years' "continuous physical presence" (*id.* at 27a, 29a). The judge noted that Mr. Rios-Pineda had initially entered the United States in the summer of 1972 and thus could not possibly have been present in the United States for seven continuous years at the time of the December 1978 deportation hearing. Moreover, the judge ruled that Mr. Rios-Pineda's 1974 departure and two-month absence under threat of deportation constituted a break in the period of

[1] "R." refers to the certified administrative record.

"continuous physical presence."[2] The immigration judge also denied respondents' application for voluntary departure pursuant to 8 U.S.C. 1254(e), noting, inter alia, that respondents had used a professional smuggler to enter this country, that Mr. Rios-Pineda had failed to depart voluntarily when given the opportunity to do so prior to institution of deportation proceedings, and that he had reentered this country only two months after his departure under the threat of deportation in 1974 (Pet. App. 29a-30a).

Respondents appealed their deportation order to the Board of Immigration Appeals (BIA), thus staying their deportation (8 C.F.R. 3.6(a)). Respondents did not challenge the denial of their request for suspension of deportation (J.A. 34-37). Rather, they claimed that deportation would violate the constitutional rights of their citizen child, that Mr. Rios-Pineda was eligible for relief under 8 U.S.C. 1182(c), that the order to show cause should never have been issued because Mr. Rios-Pineda's employer had applied for labor certification on his behalf, and that the immigration judge's questioning at the deportation hearing had violated respondents' Fifth Amendment privilege against self-incrimination. The BIA rejected each of respondents' claims and dismissed the appeal (Pet. App. 21a-24a).[3]

[2] Because Mrs. Rios-Pineda had first entered the United States in May 1974 when her husband reentered, she plainly did not meet the continuous presence requirement, and the judge did not specifically address the issue with respect to her.

[3] Respondents' brief to the BIA consisted almost entirely of conclusory allegations (J.A. 36-37). The BIA explained that the courts had uniformly held that the deportation of alien parents, even if it results in the de facto deportation of

2. In July 1980, respondents filed a petition for review in the court of appeals (J.A. 31-33), which automatically stayed their deportation pursuant to 8 U.S.C. 1105a(a)(3). Respondents contended in their brief that their constitutional rights had been violated because the immigration judge did not give them *Miranda* warnings before questioning them at the deportation hearing, that their deportation would constitute an unlawful de facto deportation of their two citizen children, and that the immigration judge erred in concluding that Mr. Rios-Pineda had not been physically present in the United States for a continuous period of seven years. Respondents urged

---

citizen children, does not violate the children's constitutional rights (Pet. App. 22a-23a, citing, *e.g.*, *Rubio de Cachu* v. *INS*, 568 F.2d 625 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Faustino* v. *INS*, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971)). The BIA found respondents ineligible for relief under 8 U.S.C. 1182(c), which permits relief from exclusion or deportation for aliens "lawfully admitted for permanent residence," because respondents had entered the country without inspection and plainly had never been admitted as lawful permanent residents (Pet. App. 23a). In addition, the BIA rejected respondents' contention that their privilege against self-incrimination was violated at the deportation hearing. Respondents were represented by counsel at the hearing, they did not object to any of the questions posed at the hearing, and they submitted no evidence that their testimony had been compelled (*id.* at 24a). Indeed, the BIA observed that counsel had freely conceded respondents' deportability and had waived the reading of their rights pursuant to 8 C.F.R. 242.16. Pet. App. 24a. Finally, the BIA held that the commencement of deportation proceedings against a deportable alien is a matter within the discretion of the District Director and was not invalid simply because Mr. Rios-Pineda had an application for labor certification pending.

the court to "order that [their] deportation * * * be suspended" (J.A. 29).

In March 1982, 15 months after the briefs were filed, the court of appeals reversed the decision of the Board and remanded the case for further proceedings (Pet. App. 16a-20a). In so doing, the court did not address the merits of any of respondents' claims of error. Instead, the court found that respondents had accrued the requisite seven years' "continuous physical presence" while their petition for review was pending, and it concluded that respondents had " 'made a substantial showing that the Board should properly afford [them] relief on the basis of the additional evidence available subsequent to the initial hearing' " (*id.* at 19a (brackets in original), quoting *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 459 (5th Cir. 1981)). The court directed the Board to hold the proceedings in abeyance for 60 days to give respondents an opportunity to file a motion to reopen their deportation proceedings (Pet. App. 20a). The court cautioned the Board "to give careful and thorough consideration to the * * * motion to reopen if, indeed, one is filed" (*id.* at 20a n.5).

3. Respondents filed a motion to reopen, accompanied by applications for suspension of deportation. In their motion to reopen, respondents alleged that they had been in the United States for a continuous period of seven years from the time of their entry on May 1, 1974, that they are persons of good moral character, and that deportation would result in extreme hardship to them and their citizen children (J.A. 16-18). With respect to the extreme hardship claim, respondents alleged that their two citizen daughters, then seven and three years of age, would be deprived of their rights to an education in United

States schools and to social assistance if respondents were deported. Specifically, respondents contended that deportation would interrupt the education of their older daughter in United States schools and would require her to attend Mexican schools where classes are conducted in Spanish. Respondents also raised general claims of psychological and economic hardship to themselves arising from "their low skills and educations" and the lower standard of living in Mexico. J.A. 16-17.

Contrary to the requirements of 8 C.F.R. 3.8(a), respondents submitted no affidavits or other evidentiary materials that specifically addressed these allegations of hardship. The only materials attached to the motion to reopen were respondents' applications for suspension of deportation, copies of respondents' income tax returns, a purchase agreement for a house, a letter showing that Mr. Rios-Pineda was employed, a school record relating to respondents' older child, and birth and marriage records (R. 20-41). Apart from their allegations of hardship, respondents pointed to certain language in the court of appeals' decision that allegedly showed that the court had already accepted their extreme hardship claim (J.A. 17-18).[4] Respondents requested the Board to grant them suspension of deportation (J.A. 18).

---

[4] The portion of the court of appeals' opinion relied on by respondents stated (Pet. App. 19a):

> Here, Bernardo and Estarnilada have been physically present in the United States continuously since May 1, 1974. Our review of the record indicates that Bernardo, in addition to being a homeowner in Omaha, has been gainfully employed at Union Packing since May of 1974. Both of Bernardo and Estarnilada's children, Ana Belia and Brenda Lee, were born in Omaha and have resided there since birth.

The BIA denied respondents' motion to reopen (Pet. App. 11a-15a). The Board noted that respondents had submitted no affidavits in support of their extreme hardship claim and concluded that "the documents and vague allegations forwarded by counsel" as part of the motion to reopen were not sufficient to establish a prima facie showing of extreme hardship (*id.* at 13a-14a).

The Board further concluded that the motion to reopen should in any event be denied in the exercise of its discretion (Pet. App. 14a-15a). The BIA observed that respondents were able to acquire seven years' presence and the additional equity of a second child only by pursuing what it considered to be "frivolous appeals," and it concluded that denial of a motion to reopen is appropriate where statutory eligibility for relief is acquired only by means of such dilatory tactics (*id.* at 14a). The BIA also noted that respondents had entered the United States in May 1974 with the assistance of a paid smuggler to help them avoid inspection, that on that occasion Mr. Rios-Pineda was returning within only two months of a forced departure, and that he had been granted administrative voluntary departure yet had failed to depart voluntarily prior to the instant deportation proceeding (*id.* at 14a-15a). Concluding that these adverse factors "evidenced [respondents'] disregard for our immigration laws" and outweighed the equities in respondents' favor, the BIA denied the motion to reopen as a matter of discretion (*id.* at 15a).

4. The court of appeals again reversed and remanded the case to the BIA with directions to reopen the deportation proceedings and hold a hearing to determine respondents' eligibility for suspension of deportation (Pet. App. 1a-10a). The court concluded

that it had implicitly decided in its earlier decision that respondents had made a prima facie case of extreme hardship and that this determination was binding on the Board as the "law of the case" (*id.* at 5a-7a). The court of appeals then reviewed the factors supporting its earlier "holding"[5] and concluded that that holding was not clearly erroneous (*id.* at 7a).

Alternatively, the court of appeals ruled that, even if the court had not decided the issue in its prior opinion, the Board abused its discretion in declining to find that respondents had made a sufficient showing of extreme hardship to warrant reopening of their deportation proceedings. The court pointed out that Mr. Rios-Pineda had claimed his mother, a resident of Mexico, as a dependent on his federal income tax returns and that the Board had never considered the hardship to respondents that deportation might entail with respect to respondents' ability to continue supporting Mr. Rios-Pineda's mother. Furthermore, the court stated that the Board had failed to consider the possibility that respondents' citizen children could speak only English, thus increasing the educational and social hardship if they were forced to go to Mexico with their parents. Pet. App. 7a-8a n.3.[6]

[5] These factors were that Mr. Rios-Pineda had been regularly employed since 1974, that respondents had made a substantial down payment on a home, and that their citizen children had lived in the United States since birth (Pet. App. 7a).

[6] The court of appeals failed to mention that respondents' motion to reopen and applications for suspension of deportation (see J.A. 22, 26) did not refer to respondents' obligation to support Mr. Rios-Pineda's mother (undoubtedly because 8 U.S.C. 1254(a)(1) limits consideration of parental hardship to a parent "who is a citizen of the United States or an alien lawfully admitted for permanent residence") and did not allege that respondents' daughters spoke only English. Moreover, both of these additional factors identified by the court of appeals were almost surely without any factual basis. Mr. Rios-Pineda's mother had been listed as a dependent on his income tax returns at one time, but she was no longer listed as a dependent on the most recent returns, 1979-1981 (see R. 26-28). And it seems most unlikely that respondents' children could not speak Spanish, given that their parents' limited knowledge of English required the deportation hearing to be conducted through an interpreter.

The court of appeals also held that the BIA's discretionary denial of respondents' motion to reopen was based on improper factors (Pet. App. 8a-9a). The court disagreed with the BIA's characterization of respondent's appeals as "frivolous," stating that the court had "twice considered petitions which, regardless of their ultimate success, have required further proceedings to fully and fairly decide the [respondents'] claim of their right to stay in this country" (*id.* at 9a). In addition, the court concluded that the Board's reliance on respondents' "disregard" for the immigration laws, as manifested by their use of a paid smuggler and by Mr. Rios-Pineda's repeated refusal to depart voluntarily, was "arbitrary, irrational, [and] contrary to the law'" (*ibid.* (brackets in original) (quoting *Batoon* v. *INS*, 707 F.2d 399, 401 (9th Cir. 1983)) because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (Pet. App. 9a).

SUMMARY OF ARGUMENT

A. Although the Immigration and Nationality Act of 1952 does not provide a procedure to reopen deportation proceedings on the basis of newly discovered

evidence, the Attorney General has accorded such relief administratively. 8 C.F.R. 3.2. This regulation is intended to prevent injustice in those unusual cases where subsequent developments have rendered unfair a validly entered deportation order. Because this remedy is not mandated by statute, common sense suggests that the agency should have broad discretion in determining whether the circumstances justify reopening deportation proceedings. This Court recently has twice confirmed that view, noting that the Attorney General's discretion to deny such motions includes the right to be restrictive in considering them. *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6; *INS* v. *Wang*, 450 U.S. 139, 144 n.5 (1981).

The Attorney General's discretion to be selective in ruling on motions to reopen is particularly broad where an alien seeks reopening for the purpose of applying for suspension of deportation—relief that is itself discretionary. The suspension remedy is an "exceptional" one that Congress designed to be granted sparingly. See *Phinpathya*, slip op. 5, 7. The Attorney General has considerable latitude in assessing whether an alien has satisfied the eligibility requirements for suspension relief (*Wang*, 450 U.S. at 144), and "unfettered discretion" to grant or deny the relief to applicants who meet the statutory criteria (*Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)).

Thus, when confronted with respondents' motion to reopen their deportation proceedings to allow them to move for suspension of deportation, the Attorney General had to consider whether the new evidence warranted reopening the proceedings, whether the statutory requirements for eligibility for suspension relief had been satisfied, and whether that relief was

likely to be granted. With respect to each of these determinations, the Attorney General's decision was entitled to substantial deference.

B. 1. a. The Board of Immigration Appeals was fully justified in denying respondents' motion to reopen on the ground that they had achieved seven years' "continuous physical presence" in this country, which is a criterion for suspension of deportation, only by filing frivolous appeals that delayed their deportation. There can be no doubt that the appeals were frivolous. Respondents' briefs on appeal to both the BIA and the court of appeals were conclusory and essentially without citation to authority. The briefs raised claims that respondents' counsel almost surely had to know were without legal foundation and, in some instances, without any factual basis.

b. The court of appeals' disagreement with the BIA's characterization of the appeals as "frivolous" appears to be one of semantics. The court did not suggest that the contentions raised on appeal had any substantive merit; it simply noted that they were not "frivolous" because they had resulted in a remand for further proceedings. The availability of that relief, however, was *solely* a function of the delay in deportation occasioned by the meritless appeals. See Pet. App. 9a. Thus, the court of appeals has held that "buying time" is itself a legitimate reason to take an appeal—a view that denigrates and trivializes the appellate process.

c. i. Strong policy considerations justify the BIA's refusal to reopen deportation proceedings in circumstances like these. If aliens were able to qualify for suspension of deportation by abusing the appellate process in order to delay their departure from this country, the "continuous physical presence" require-

ment imposed by Congress would be rendered ineffective as a means of limiting the availability of suspension relief. Moreover, widespread use by aliens of procedural devices unjustifiably to delay their deportation for long periods of time already has created serious problems of administrative burden and disrespect for the law. Reopening respondents' deportation proceedings would establish a precedent that would seriously exacerbate these problems. Therefore, the BIA would have been remiss in its duty if it had granted respondents' motion to reopen.

ii. Even if the BIA's decision were not so clearly correct, the Board certainly cannot be said to have abused its broad discretion in denying respondents' motion to reopen. The court of appeals' opinion does not explain why the BIA's ruling was arbitrary and capricious and shows no appreciation that it was obliged to accord that ruling considerable deference. The court appears to have held that the Board has no discretion to deny a motion to reopen when the basis of the motion is that the alien has satisfied the threshold requirements for suspension of deportation. That holding not only conflicts with decisions of this Court, but also creates practical problems for the administration of the immigration laws.

It is particularly important that the Attorney General be given broad authority to exercise his discretion to grant relief sparingly in the case of motions to reopen. Aliens subject to deportation orders can easily allege some newly discovered evidence, and thus file a facially valid motion to reopen, which in turn can lead to a stay of deportation. Unless the Attorney General is permitted broad discretion to deny such motions for reasons like abuse of the appellate

process, they will be a vehicle for endless delay of deportation.

2. The BIA also was justified in denying relief because of respondents' deliberate disregard for the immigration laws. The court of appeals held that consideration of this factor was "improper and irrelevant" because "[s]uch 'disregard' is necessarily present in some form in most deportation proceedings" (Pet. App. 9a). But there is a considerable difference between an alien who complies with the law, apart from having stayed in the country illegally, and an alien who enters the United States without inspection, deceives the government while in the United States, and abuses the procedural opportunities provided to him by the immigration laws. In determining whether an alien is deserving of discretionary relief, it unquestionably is appropriate for the Attorney General to take that difference into account.

ARGUMENT

THE ATTORNEY GENERAL HAS DISCRETION TO DECLINE TO REOPEN DEPORTATION PROCEEDINGS WHEN THE ALIEN HAS BECOME ELIGIBLE FOR THE REQUESTED UNDERLYING DISCRETIONARY RELIEF ONLY BY FILING FRIVOLOUS APPEALS AND HAS IN OTHER WAYS EXHIBITED DISREGARD FOR THE IMMIGRATION LAWS

In recent years, this Court has repeatedly emphasized that extensive judicial interference with the exercise of discretionary authority accorded the Attorney General under the Immigration and Nationality Act of 1952 conflicts with the intent of Congress and undermines principles of separation of powers. See *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip

op. 11-12; *INS* v. *Wang*, 450 U.S. 139, 146 (1981).[7] This case presents an extreme example of such interference. Here, the court of appeals has prevented enforcement of lawful administrative orders (issued in 1978) requiring the deportation of aliens who have conceded deportability, by holding that the Board of Immigration Appeals erred in failing to grant discretionary relief designed to deal with the extraordinary situation.

The court of appeals' holding appears to rest on little else than the view that the judges on the panel would have granted respondents' requests for relief had they been the decisionmakers at the agency. Indeed, the court's error is particularly striking in this case because the BIA not only acted well within its discretionary authority, but in fact took the only action sensible in the circumstances. As the undisputed evidence showed, respondents achieved eligibility for the relief sought only by delaying their deportation by filing frivolous appeals.

The decision of the court of appeals thus reflects two fundamental errors inimical to the sound functioning of the immigration laws. It ignores the fact that Congress has delegated to the Executive Branch, rather than to the courts, the primary responsibility for dispensing discretionary relief in the immigration area, and it invites deportable aliens to abuse the immigration system by offering the promise that such abuse may well pay substantial dividends.

---

[7] The Attorney General has delegated his authority under the immigration laws to the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals, and other special officers. See 8 C.F.R. 2.1, 3.1.

A. The Attorney General Has Broad Discretion In Considering Whether To Grant A Motion To Reopen Deportation Proceedings For The Purpose Of Considering An Application For Suspension Of Deportation

1. Although Congress generally has specified the procedures for conducting deportation proceedings in Section 242 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252, the Act does not provide a mechanism by which an alien may reopen deportation proceedings after a final order of deportation has been issued. The Attorney General has provided by regulation, however, that deportation proceedings may be reopened on the basis of new developments. 8 C.F.R. 3.2, 3.8; see *INS* v. *Wang*, 450 U.S. at 140-141. The regulation states that a motion to reopen will not be granted unless the new evidence sought to be introduced is material and was not available and could not have been discovered at the prior hearing; moreover, it provides that a motion to reopen for the purpose of applying for discretionary relief will not be granted "unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."[8]

The regulation authorizing reopening of deportation proceedings appears to have been intended to permit relief in the unusual case in which subsequent developments have undermined the justification for an outstanding order of deportation and rendered it unfair. Because the procedural avenue of reopening deportation proceedings would not exist but for the action of the Attorney General in creating it by regulation, it stands to reason that the Attorney General

---

[8] Under 8 C.F.R. 3.8, the motion to reopen "shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material."

should have considerable discretion in exercising his authority to determine whether the circumstances warrant granting the remedy. See *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). See also *Shin* v. *INS*, No. 84-1097 (D.C. Cir. Dec. 14, 1984), slip op. 7 (Starr, J., dissenting).

This Court has expressly recognized the broad discretion of the Attorney General and his delegates in considering a motion to reopen deportation proceedings. In *INS* v. *Wang*, 450 U.S. at 143-144 n.5, the Court stated:

> The present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulation may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

The Court went on to note with approval the dissent in the lower court in a companion case to *Wang*, which explained the importance of affording the Attorney General discretion to be selective in granting a limited number of motions to reopen:

> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations."

Ibid. (quoting *Villena* v. *INS*, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting)).

The Court recently addressed the BIA's discretionary authority with respect to motions to reopen in a situation closely analogous to the present case. In *INS* v. *Phinpathya*, *supra*, the issue before the Court was whether an alien seeking suspension of deportation had met the seven years' continuous presence requirement despite a three month trip abroad during the seven year period. In this Court, the alien argued that the case was moot because by that time she had completed seven years' continuous presence in the United States since her return from the trip in question. The Court rejected the mootness argument, finding that the alien had not established that she would now be eligible for suspension of deportation because, although she had filed a motion to reopen the deportation proceedings, "granting of the motion is entirely within BIA's discretion." Slip op. 5 n.6. Thus, *Phinpathya* confirms the Court's statement in *Wang* that the BIA may exercise its discretion to deny a motion to reopen "beyond requiring proof of a prima facie case." 450 U.S. at 144 n.5.

2. The principle that the BIA has "the right to be restrictive" in reopening deportation proceedings is particularly apt in a situation like the one presented here, where the purpose of reopening the proceeding is solely to allow the alien to petition for suspension of deportation—relief that is itself discretionary. In such a situation, it is clear that the alien must show more than statutory eligibility for the relief. He

must also show that "a grant of relief may be warranted as a matter of discretion." *Marcello* v. *INS*, 694 F.2d 1033, 1035 (5th Cir.), cert. denied, 462 U.S. 1132 (1983).[9]

In the case of suspension of deportation, Congress has insisted that an alien satisfy "strict threshold criteria" (*INS* v. *Phinpathya*, slip op. 11). In order to be eligible for suspension relief, an alien must have been physically present in the United States for seven continuous years, must have been a person of good moral character during that time, and must be able to show that his deportation would cause "extreme hardship" to himself or to his spouse, parent, or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1).[10]

---

[9] The *Marcello* court addressed this point in detail (694 F.2d at 1035 (citation omitted)):

> A motion to reopen, entitling the applicant to present new evidence (and involving further delay in the enforcement of a deportation order), is not available upon a bare showing of statutory eligibility. Rather, to be entitled to a reopening and further hearing, the alien must first make a prima facie showing that there is a reasonable likelihood that the relief sought would be granted at the reopened hearing. The prima facie showing includes not only that there is a reasonable likelihood that the statutory requirements for the relief sought are satisfied, but also a reasonable likelihood that a grant of relief may be warranted as a matter of discretion.

[10] The suspension of deportation remedy was first added to the immigration laws in 1940 (ch. 439, § 20, 54 Stat. 672). In 1952, a new and more restrictive provision was enacted because of what Congress perceived as abuse of the suspension remedy that was "grossly unfair to aliens who await their turn on the quota waiting lists." S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952). The 1952 amendment made the suspension remedy available only upon a showing of "exceptional and extremely unusual hardship" (ch. 477, § 244, 66 Stat. 214). The provision was amended again in 1962 to substitute the present requirement of "extreme hardship" (Pub. L. No. 87-885, § 4, 76 Stat. 1248).

The Attorney General has the authority to construe "'extreme hardship' narrowly" in considering suspension applications. *INS* v. *Wang*, 450 U.S. at 145. These threshold requirements reflect what this Court has recognized as the "exceptional nature of the suspension remedy." *Ibid.* See also *INS* v. *Phinpathya*, slip op. 5, 7, 10 n.11.

Moreover, suspension relief is not available to every alien who satisfies the eligibility requirements. By its terms, the statute confers upon the Attorney General the power to determine "*in his discretion*" which eligible applicants should receive this extraordinary relief. As the Court said in *Jay* v. *Boyd*, 351 U.S. 345, 353 (1956), "Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General." See also *INS* v. *Wang*, 450 U.S. at 144. The Attorney General's discretion in this regard is "unfettered." *Jay* v. *Boyd*, 351 U.S. at 354. See also *Foti* v. *INS*, 375 U.S. 217, 228 (1963); *Ramos* v. *INS*, 695 F.2d 181, 184-185 (5th Cir. 1983). Indeed, if the Attorney General decides that the relief should be denied as a matter of discretion it is unnecessary for him even to consider whether the threshold statutory eligibility requirements are met. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).

Even after the Attorney General has determined to exercise his discretion in favor of granting suspension of deportation, the alien is not assured of obtaining the relief. Under the statute, each administrative order of suspension must be reported to Congress and

is subject to legislative veto there. 8 U.S.C. 1254(c).[11] This requirement of congressional review of each individual case, along with the fact that each suspension of deportation that is ultimately granted results in a corresponding reduction in the number of nonpreference immigrant visas authorized to be issued during that fiscal year (8 U.S.C. 1254(d)), plainly indicates that the remedy of suspension was designed to be issued sparingly. Thus, while Congress created the remedy of suspension of deportation, the statute reveals that it "was interested in limiting grants of this relief to a minimum." *Jay* v. *Boyd*, 351 U.S. at 356.

In sum, when an alien files a motion to reopen deportation proceedings in order to apply for suspension of deportation, the Attorney General is invested with extremely broad discretion in acting on the motion because of his discretionary authority with respect to both the procedure itself and the ultimate relief being sought. Because of the administrative burden engendered by the granting of such a motion (see *Wang*, 450 U.S. at 144 n.5; *Marcello* v. *INS*, 694 F.2d at 1035) and the exceptional nature of the suspension remedy, it is important that the Attorney General be exceedingly selective in granting such motions.

B. The BIA Did Not Abuse Its Discretion In Declining To Reopen Respondents' Deportation Proceedings

Against this background, it cannot seriously be contended that the BIA abused its discretion in declining

[11] The legislative veto provision was declared unconstitutional in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983). Suspension determinations nonetheless remain subject to a "report and wait" requirement. Slip op. 14 & n.9.

to grant respondents' motion to reopen their deportation proceedings in order to apply for suspension of deportation. The Board found that respondents had achieved the statutory eligibility requirement of seven years' continuous presence only by filing frivolous appeals. The Board also found that Mr. Rios-Pineda had repeatedly exhibited disregard for the immigration laws, including failing to leave the country after requesting the privilege of voluntary departure. Given this history of abuse of the immigration system—both by misusing for the sole purpose of delay the appellate process that is designed to guarantee fair decisionmaking and by deceiving the immigration authorities to avoid departure—the BIA would have been remiss in its duty to exercise its discretion selectively and intelligently had it elected to reopen respondents' deportation proceedings.

1. *The BIA's Decision Not To Reopen The Deportation Proceedings Was Justified By The Fact That Respondents Had Qualified For Suspension Of Deportation Only By Filing Frivolous Appeals*

a. *Respondents' Appeals Were Frivolous.* There can be no doubt that the appeal filed by respondents from the immigration judge's original deportation order was frivolous and served no purpose other than to delay respondents' deportation until they could satisfy the seven year "continuous physical presence" requirement.[12] Respondents raised four separate contentions in their brief on appeal to the BIA (J.A. 36-37). Each of these contentions was conclusory and completely without citation to authority, and respondents'

[12] The filing of this appeal stayed respondents' deportation while the case was pending before the BIA. 8 C.F.R. 3.6(a).

counsel could have had no reasonable expectation that they were entitled to prevail on any of them.

Respondents' primary contention was that their deportation would result in an unconstitutional de facto deportation of their citizen child (J.A. 36-37). At the deportation hearing, however, the immigration judge had informed respondents' counsel that this argument was contrary to established law, and, moreover, that the one case that counsel cited in support, *Acosta* v. *Gaffney*, 413 F. Supp. 827, 831-833 (D.N.J. 1976), rev'd, 558 F.2d 1153 (3d Cir. 1977), had been reversed on appeal (R. 100-101). Thus, respondents were aware that this argument was foreclosed by prior precedent, as the BIA subsequently found (Pet. App. 22a-23a);[13] they dealt with this problem simply by failing to cite any authority.

Respondents also raised on appeal the contention that they should have been entitled to relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), based on their alleged seven years of residency in this country and because they "never committed any illegal or anti-social activity" (J.A. 37). This contention was totally without factual basis because neither respondent had been "lawfully admitted for permanent residence"—a prerequisite to Section 212(c) relief. See Pet. App. 23a. In any event, the immigration judge had already found that Mr. Rios-Pineda had not been in the United

[13] At the time of respondents' appeal, their argument had been rejected by at least six different circuits, including the Eighth Circuit. See *Mamanee* v. *INS*, 566 F.2d 1103, 1105-1106 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F.2d at 1157; *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Cervantes* v. *INS*, 510 F.2d 89, 91-92 (10th Cir. 1975); *Enciso-Cardozo* v. *INS*, 504 F.2d 1252, 1253 (2d Cir. 1974); *Mendez* v. *Major*, 340 F.2d 128, 131 (8th Cir. 1965).

States for seven years, and respondent made no attempt to explain why this mathematical determination was incorrect.[14]

In addition, respondents argued briefly that the order to show cause had been issued "extemporaneously" and should be invalidated because Mr. Rios-Pineda had an application for labor certification pending at the time. As the BIA subsequently held (Pet. App. 23a), this contention was wholly without merit because neither the immigration judge nor the Board has jurisdiction to review the District Director's decision to institute deportation proceedings. *Lopez-Telles* v. *INS*, 564 F.2d 1302, 1304 (9th Cir. 1977). See 8 C.F.R. 103.1(n), 242.1(a). In any case, a pending application for labor certification does not entitle an illegal alien to escape deportation. See *Bowes* v. *District Director*, 443 F.2d 30 (9th Cir. 1971).

Finally, respondents' claim that their Fifth Amendment privilege against self-incrimination was violated at the deportation hearing was fanciful on its face.[15] Respondents did not even allege that they had been coerced in any way to give any responses to the immigration judge, and, indeed, their attorney had waived the requirement that the immigration judge explain respondents' rights to them (Pet. App. 24a; R. 84).[16] Moreover, respondents did not explain how

[14] Thus, even if respondents had intended in their appeal to seek suspension of deportation, rather than Section 212(c) relief, the contention was frivolous because the seven year requirement plainly was not satisfied.

[15] Deportation proceedings are civil, not criminal (see *INS* v. *Lopez-Mendoza*, No. 83-491 (July 5, 1984), slip op. 5), so it is clear that respondents had no Fifth Amendment right not to be questioned at the hearing.

[16] INS regulations instruct the judge to notify the alien at the beginning of the deportation proceeding of his rights,

their own testimony had incriminated them; in fact, before respondents answered any questions after they were sworn, their counsel already had admitted the allegations in the show cause order and conceded deportability on their behalf (Pet. App. 24a; R. 84-86).

After the BIA dismissed respondents' appeal (see note 3, *supra*), they pursued several of these contentions in a petition for review to the Eighth Circuit (J.A. 31-33).[17] In their brief in the court of appeals, respondents raised three claims: (1) that the "evidence" against them was tainted because they had not been given *Miranda* warnings; (2) that their deportation was an unconstitutional deportation of their children; and (3) that Mr. Rios-Pineda had been present in the country for seven years and hence was entitled to suspension of deportation (J.A. 28-29). This appeal was, if possible, even more frivolous than the prior administrative appeal because respondents now had the benefit of the BIA's point-by-point refutation of their contentions, yet they made no effort to show why the BIA had erred. Thus, respondents again failed to explain how there could be a Fifth Amendment or *Miranda* violation when their attorney had specifically waived the opportunity for them to be informed of their rights by the judge, and, in any case, when their attorney had conceded deportability on their behalf. By the same token, respondents' argument that their children were being subjected to unconstitutional de facto deportation (see J.A. 29) rested on two cases rejecting that position and on a district

inter alia, to counsel, to present evidence and object to the evidence against him, and to cross-examine witnesses. The alien may waive his right to this explanation. 8 C.F.R. 242.16.

[17] The filing of this petition entitled respondents to an automatic stay of deportation. 8 U.S.C. 1105a(a)(3).

court decision that both the BIA (Pet. App. 23a) and the immigration judge (R. 100-101) had identified as having been reversed on appeal. Nor could respondents point to any error in the findings below that they had not met the seven year requirement for suspension of deportation (a claim that respondents did not even raise in the BIA).[18]

b. *The Court Of Appeals Asserted No Justification For Respondents' Appeals Other Than To Delay Deportation Long Enough For Them To Qualify For Suspension Relief.* Notwithstanding the nature of the contentions raised by respondents in these appeals, the court of appeals held that they "do not fall into the 'frivolous' category" (Pet. App. 9a). In reaching this conclusion, however, the court of appeals curiously did not address the merit of any of the conten-

[18] By the time respondents' brief in the court of appeals was due, more than seven years had elapsed since Mr. Rios-Pineda had first entered the country, although Mrs. Rios-Pineda still could make no possible claim of seven years' presence. Even Mr. Rios-Pineda, however, did not have seven years' *continuous* presence in the country because he had left the United States for two months in 1974 under threat of deportation. While at the time of the hearing, prior to this Court's decision in *INS* v. *Phinpathya*, the administrative practice was that some minor absences were not considered to break the continuous presence period, it was never the case that a departure under threat of deportation and subsequent illegal entry was not considered a meaningful interruption of the period. The immigration judge had informed respondents and their counsel both at the deportation hearing (R. 90) and in his written decision (Pet. App. 27a) that the law was clear that such an absence was a legal interruption of the period of continuous presence. See *Heitland* v. *INS*, 551 F.2d 495, 503-504 (2d Cir.), cert. denied, 434 U.S. 819 (1977); *Segura-Viachi* v. *INS*, 538 F.2d 91, 92 (5th Cir. 1976); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760 (9th Cir. 1972).

tions raised by respondents on appeal. Rather, the court simply noted that the petitions for review, "regardless of their ultimate success, have required further proceedings to fully and fairly decide [respondents'] claim of their right to stay in this country" (*ibid.*). This is technically true, of course, but the "further proceedings" ordered by the court resulted *solely* from the fact that respondents were able to delay their deportation long enough—by filing meritless appeals—to meet the eligibility requirements for suspension of deportation. The court of appeals' first decision to remand the case to the Board was based exclusively on respondents' satisfaction of the seven year presence requirement during the pendency of the appeal; the remand was not attributable to a single one of the substantive contentions raised by respondents.

The import of the court of appeals' finding here is quite astonishing: any litigation that buys sufficient time to accrue seven years' physical presence cannot be considered "frivolous"; delay is thus recognized as a legitimate end in itself. While that finding represents an unfortunate attitude toward the appellate process, it does not indicate any factual disagreement between the court of appeals and the Board on the nature of respondents' appeals. Rather, the difference between the characterization of respondents' appeals by the court and by the BIA seems to be one of semantics. To the Eighth Circuit, an appeal cannot be classified as "frivolous" if it was effective in achieving delay that improved the alien's legal position, even if it is undisputed that the appeal was totally devoid of substantive merit.

c. *The BIA Acted Well Within Its Authority In Denying The Motion To Reopen Because Of Respondents' Frivolous Appeals.* The court of appeals' holding that, in circumstances like those presented here, the BIA lacks discretion to refuse to reopen deportation proceedings for the purpose of permitting an alien to apply for suspension of deportation cannot be countenanced. Enforcement of the immigration laws is already plagued by extensive deportation delays caused by the manipulation of procedural devices by deportable aliens. It would have been irrational for the Board to reward respondents' abuse of the appellate process by reopening their deportation proceedings—a precedent that would give added incentive to aliens to misuse the appellate process for purposes of delay.

Perhaps more important, even if there were some argument for permitting reopening here, the Board surely cannot be said to have abused its discretion in failing to reopen. The court of appeals committed serious error by failing to accord any genuine deference to the Board's exercise of its discretion. That error is particularly grievous in the context of a motion to reopen deportation proceedings, because it is so easy for an alien to accrue "new evidence" that will support a facially valid motion to reopen. The sheer number of such motions and their potential as vehicles for endless delay make it imperative that the Board have broad discretion to be selective in granting motions to reopen.[19]

---

[19] Motions to reopen are not limited to cases involving applications for suspension of deportation; rather, a motion to reopen may be filed in virtually every deportation case. The Executive Office of Immigration Review in the Department of Justice advises us that approximately 3,000 motions to reopen

i. Strong policy considerations militate against giving an alien the opportunity to apply for suspension of deportation when he has met the seven years' "continuous physical presence" requirement only by delaying his deportation through the filing of plainly unmeritorious appeals. For many illegal aliens, suspension of deportation is the only avenue through which they can hope to remain in this country once their illegal presence is detected and the government has moved to deport them. Prior to this case, the seven year presence requirement might have been viewed as an insurmountable barrier for many aliens. But the decision below suggests that this requirement, which Congress contemplated as a substantial limitation on the availability of suspension relief (see *INS* v. *Phinpathya, supra*), can be rendered almost meaningless by dilatory tactics. It is now more than six years since respondents were ordered deported; this indicates that even if respondents had been apprehended by the INS immediately after they had illegally entered this country, they still could have achieved the seven year requirement by filing unmeritorious motions and frivolous appeals.

As the reported cases reflect, there are already too many incentives and opportunities for illegal aliens to take advantage of immigration provisions intended to mitigate true hardship, in an effort to

---

were considered by immigration judges during the year ending in April 1984. During 1983, the BIA adjudicated approximately 450 motions to reopen deportation proceedings. (A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5, 242.22. However, where, as here, the order of deportation has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2, 3.8).

frustrate deportation and to prolong substantially their illegal stay in this country. See, *e.g.*, *Oum* v. *INS*, 613 F.2d 51, 52-54 (4th Cir. 1980); *Hibbert* v. *INS*, 554 F.2d 17, 19-21 (2d Cir. 1977); *Schieber* v. *INS*, 520 F.2d 44 (D.C. Cir. 1975). Many aliens have a double incentive for dilatory tactics—delay for its own sake to prolong an unlawful stay in this country, and delay designed to improve a legal position by accruing sufficient time to meet the eligibility requirements for suspension or other relief. Plainly, rewarding such delay by requiring the Attorney General to reopen deportation proceedings in a case like this one can only further encourage deportable aliens to file frivolous motions and appeals.[20]

The facts of this case itself graphically illustrate that, for many illegal aliens, delay alone has become the basic legal strategy. From the time that Mr. Rios-Pineda was apprehended, respondents have concentrated on using every means at their disposal to postpone their departure from this country until they could accrue seven years' continuous presence. First, Mr. Rios-Pineda agreed to depart voluntarily and obtained at least two extensions of time to depart. When told that he would not receive any further extensions, Mr. Rios-Pineda simply refused to leave by

---

[20] Accordingly, with the exception of the court below, the lower courts have upheld the Attorney General's discretionary authority to deny motions to reopen because of the alien's abuse of the appellate process in order to delay deportation. See *LeBlanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983); *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Balani* v. *INS*, 669 F.2d 1157, 1160-1162 (6th Cir. 1982); *Der-Rong Chour* v. *INS*, 578 F.2d 464, 467-468 (2d Cir. 1978), cert. denied, 440 U.S. 980 (1979); *Schieber* v. *INS*, 520 F.2d at 52-53; *Lam Chuen Ching* v. *INS*, 467 F.2d 644, 645 (3d Cir. 1972).

the appointed day, thereby requiring the INS to institute deportation proceedings. See Pet. App. 28a; R. 97-98. The stage then shifted to the December 1978 hearing where, after conceding deportability, respondents' counsel asked that the deportation order be stayed until respondents would become eligible for suspension of deportation (J.A. 38)—*a period of two and one half more years.* When it became apparent that the immigration judge would not grant such a stay, respondents' attention turned to the appellate process. Indeed, respondents' counsel first announced his intention to appeal even before the immigration judge rendered his decision (see R. 94-95).

Generally recognized principles of equity strongly indicate that it would have been inappropriate to grant respondents suspension relief in these circumstances. For example, when a party receives additional monies because of the existence of an injunction that is later overturned, it ordinarily is required to make restitution of those monies. *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry.*, 249 U.S. 134, 145-146 (1919). See *Ex parte Lincoln Gas & Electric Light Co.*, 256 U.S. 512, 518 (1921); cf. also *United States* v. *Tateo*, 377 U.S. 463, 468 (1964) (defendant should not reap benefit because of delay in requesting relief). The same principle applies when the benefit obtained is not simply money, but rather the satisfaction of some prerequisite to relief or recovery that depends on the passage of time. Thus, when a military officer achieves sufficient service time to qualify for a benefit only because he obtained an injunction that was later determined to be erroneous, the courts have held that he is not entitled to the benefit. See *Cass* v. *United States*, 483 F.2d 220, 222 (9th Cir. 1973), aff'd, 417 U.S. 72 (1974); *Pauls* v. *Seamans*, 468 F.2d 361, 363 (1st Cir. 1972). The same rule should govern here, where respondents were able to meet the seven year requirement not because of an injunction but because of the automatic stays of deportation brought about by their appeals.[21] In short, we think it clear that the BIA acted wisely in denying respondents' motion to reopen.

ii. Even if the wisdom of the BIA's decision were debatable, however, the court of appeals erred in failing to accord it considerable deference. The court's opinion shows no recognition of the BIA's broad discretion in ruling on motions to reopen. While the decision pays lip service to the "abuse of discretion" standard, the court nowhere suggests why the BIA's decision " 'was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group.' " *LeBlanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983) (quoting *Balani* v. *INS*, 669 F.2d 1157, 1160 (6th Cir. 1982)). As a practical matter, the court approached the question as though the Board had no discretion at all and its decisions whether to grant reopening were subject to de novo review.[22]

---

[21] The BIA in fact has taken a more lenient approach than these cases would allow and has been willing to consider reopening for application for suspension of deportation in some cases where the seven year presence requirement was not met until after appeal. However, this is surely not a case warranting such consideration. The appeals here were not merely erroneous; they were correctly found by the BIA to be "frivolous." When the appellate process is misused simply to "buy time," it is plainly unreasonable to allow an alien to profit from the delay.

[22] The court of appeals' failure to respect the Board's discretion is even more blatantly evidenced in another aspect of

As noted above (pages 17-22, *supra*), the Board's broad discretion in this area has been repeatedly recognized by decisions of this Court. In addition, there are weighty practical reasons why discretionary remedies such as granting motions to reopen and suspension of deportation must be left in the first instance to the Attorney General with only limited review by the courts. These reasons were well summarized by Judge Sneed in his dissent in *Wang* v. *INS*, 622 F.2d 1341, 1351 (9th Cir. 1980) (en banc), rev'd, 450 U.S. 139 (1981):

> The judicial process is quite unsuited to deal dispositively with the many issues arising from our immigration statutes and policies. Its nature limits our vision to the alien before us and conceals from us the problems of the multitudes of aliens, both within and without the Nation, who wish to reside legally within the United States. What in the judicial process may appear to be just may in fact be gross preferential treatment when viewed in its total setting. Only the administrative process can provide the overview of all relevant facts and policies upon which proper justice must rest.

The relief of reopening deportation proceedings can be granted only sparingly; it imposes a substantial

---

its decision. As we noted in our petition (at 14-15 n.12), the court's conclusion (Pet. App. 5a-7a) that it had already resolved the extreme hardship issue on the first appeal reflects a total disregard of the Attorney General's primary role in this area, because the Attorney General plainly had not yet made any finding on the extreme hardship issue. Thus, the court's purported ruling on the first appeal could only have been on a de novo basis; the court obviously could not defer to agency discretion that had not yet been exercised.

burden on immigration judges and the BIA to hold new hearings and review the merits of numerous requests for discretionary relief in cases where deportation proceedings apparently have been completed. The court of appeals erred in substantially restricting—if not eliminating [23]—the Attorney General's discretion to choose the most meritorious of the many motions to reopen that are filed.

The flexible nature of the motion to reopen procedure invites a burdensome flood of such motions, which makes it particularly important that the Attorney General have wide discretion to be selective in granting that relief. It is extremely easy for any deportable alien to file a motion to reopen that on its face meets the requirements of the regulation. A motion to reopen may be filed to challenge the basis for the deportation order itself or to give the alien the opportunity to raise any of a number of claims for discretionary relief. And the relevant regulation, which places no limit on the number of motions to reopen that may be filed, is expansively worded in order to give the Attorney General broad authority to grant relief whenever it is warranted. Any new evidence that is material and previously unavailable can support a motion to reopen.[24]

---

[23] To the extent the court has held that the BIA *must* reopen deportation proceedings when the grounds for the motion are that the alien has just met the seven year requirement for suspension relief, its decision is flatly inconsistent with this Court's decision in *Phinpathya*. If an alien were entitled to reopening in such a case, Phinpathya would also have been so entitled and, as she argued, her case in the Supreme Court would have been moot. This Court, however, explicitly rejected that contention. Slip op. 5 n.6.

[24] Numerous cases illustrate how easy it can be to meet or manipulate this "new evidence" requirement. See, *e.g.*, *Car-*

If the Board is allowed wide discretion to be selective in considering motions to reopen, it can control the potential administrative burden they create and the courts of appeals can expeditiously dispose of most petitions for review filed in connection with such motions. If, on the other hand, the Board's decision on these motions is reviewed by the courts under something approaching a de novo standard, as was the case below, it will lead to "endless delay of deportation by aliens creative • • • enough to continuously produce new and material facts." *INS* v. *Wang*, 450 U.S. at 144 n.5 (quoting *Villena* v. *INS*, 622 F.2d at 1362 (Wallace, J., dissenting)).

2. The BIA's Decision Not To Reopen The Deportation Proceedings Was Justified By Respondents' Repeated Flouting Of The Immigration Laws

In denying the motion to reopen, the BIA also relied on respondents' repeated disregard for the Nation's immigration laws, evidenced by their use of a paid smuggler to enter the country and by Mr. Rios-

---

rete-Michel v. *INS*, 749 F.2d 490 (8th Cir. 1984) (children "adapting well to life in the United States"; deterioration of economic conditions in Mexico); *Chae Kim Ro* v. *INS*, 670 F.2d 114 (9th Cir. 1982) (citizen child born two years earlier, only two days after appeal taken to BIA); *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) (doctor's letter re tonsillitis susceptibility); *Ravancho* v. *INS*, 658 F.2d 169 (3d Cir. 1981) (new psychiatric evaluation).

The passage of time alone can transform existing conditions into new grounds on which to base a motion to reopen. At the deportation hearing in this case, for example, respondents sought to have their deportation delayed because Mrs. Rios-Pineda was expecting a child (R. 104, 107). Now the court of appeals has found the existence of extreme hardship because, inter alia, that child (now almost six years old) "may only speak English" (Pet. App. 7a n.3).

Pineda's abuse of the privilege of voluntary departure granted to him (Pet. App. 15a). The court of appeals found that reliance on this factor was "arbitrary and irrational" because all deportable aliens have exhibited disregard for the immigration laws (*id.* at 9a). But this fact does not mean that the BIA in exercising its discretion may not differentiate among aliens on the basis of the degree to which they have flouted the immigration process. There is a difference between an alien who is present in the country illegally but otherwise complies with the law and an alien who enters the United States without inspection, deceives the government while in the United States, and abuses the privileges conferred upon him by the immigration system. The Attorney General certainly ought to be able to recognize that difference in exercising his discretionary authority to grant reopening or suspension of deportation. See, *e.g.*, *Moore* v. *INS*, 715 F.2d 13, 15 (1st Cir. 1983); *Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1212 (9th Cir. 1983); *Men Keng Chang* v. *Jiugni*, 669 F.2d 275, 278 (5th Cir. 1982); *Pang Kiu Fung* v. *INS*, 663 F.2d 417, 419 (2d Cir. 1981). Just as a fugitive from justice is not entitled to pursue relief through the courts, an illegal alien who remains in this country by evading valid orders to depart should not be entitled to discretionary administrative relief from deportation. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970).

The same practical factors discussed above that make it appropriate to consider abuse of the appellate process in ruling on motions to reopen make it appropriate to consider flouting of the immigration laws. Because the Attorney General must be selective

in acting on such motions, it is reasonable for him to deny reopening to individuals who repeatedly have exhibited a disregard for the legal process, which casts doubt on their desirability as residents of the United States. Moreover, a contrary rule would encourage aliens found deportable to deceive the INS by requesting voluntary departure even if they have no intention of leaving, since that deceit could not be held against them if they later seek discretionary relief.[25] Thus, an alien would be able to remain at large for a substantial period simply by failing to depart voluntarily; the elapsed time until his apprehension and deportation could be spent accruing some new basis for seeking discretionary relief. See, *e.g.*, *Shin* v. *INS*, No. 84-1097 (D.C. Cir. Dec. 14, 1984) (alien failed to depart when visa expired in 1973, failed to depart voluntarily in 1976, failed to appear for deportation in 1979, sought relief on the basis of 1980 marriage to permanent resident); *Luna* v. *INS*, 709 F.2d 126 (1st Cir. 1983) (citizen child born after failure to depart voluntarily); *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) (second motion to reopen filed on basis of new medical evidence after twice failing to depart voluntarily).

---

[25] Obviously, any rule that further increases the likelihood that aliens will evade their responsibilities under the immigration laws—by allowing them to reap substantial benefits from such misconduct—has the general effect of weakening the immigration system. It should be noted, however, that the rule established by the court of appeals also can be expected to result in restrictions on the privileges available to those aliens who do not abuse the legal process. Immigration judges predictably will become reluctant to grant the privilege of voluntary departure, even to aliens who ultimately would abide by their promise to depart, if aliens to whom the privilege is granted deceitfully use it as a means to extend their illegal stay.

Such machinations should not be tolerated. If the Attorney General may weigh against an alien the fact that he abused the legal process by filing frivolous appeals, it seems a fortiori that the Attorney General should be permitted to weigh against an alien the fact that he disregarded the legal process. The court of appeals' holding that such evidence may never be considered is a totally irrational and unacceptable restriction on the Attorney General's discretion and an affront to our immigration system.

In sum, the decision of the court of appeals is an extreme example of judicial usurpation of the Attorney General's discretionary authority of the sort recently condemned by this Court. *INS* v. *Phinpathya*, slip op. 12. Perhaps because of a thinly-veiled dissatisfaction with the existing immigration laws (see Pet. App. 2a, 10a), the court has exercised its authority in a way that will add substantially to the difficulty of deporting aliens illegally in the United States and that will impose a crushing administrative burden on the INS. If the decision below is affirmed, the motion to reopen will be converted from a procedure designed to prevent injustice in extraordinary cases into a loophole that permits "endless delay of deportation." *Wang*, 450 U.S. at 144 n.5 (citation omitted). That result can only further encourage disregard for our Nation's immigration laws and is "grossly unfair to aliens who await their turn on the quota waiting lists." S. Rep. 1137, 82d Cong., 2d Sess. 25 (1952). See also *Wang*, 450 U.S. at 145.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

JAMES A. HUNOLT
Attorney

JANUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10156

Office-Supreme Court, U.S.
FILED
FEB 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 83-2032

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

BERNARDO RIOS-PINEDA
AND
ESTARNILADA RIOS-PINEDA DE RIOS,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Lawrence H. Rudnick
ORLOW, FULLER, RUBIN & STEEL
936 Public Ledger Building
Philadelphia, PA 19106
(215) 922-1181

Roman de La Campa
2219 Allan Street
Sioux City, Iowa 51103
(814) 258-8852
Counsel for Respondents

PACKARD PRE... 6-2000
BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE:	
A. Factual Background	1
B. History of the Case	2
SUMMARY OF ARGUMENT	5
ARGUMENT:	7
A. The Board of Immigration Appeals has authority to deny Motions to Reopen to apply for suspension of deportation in proper cases	7
B. Statutory and Regulatory Framework	9
C. The Court of Appeals for ther Eighth Circuit applied the correct standard of review	16
D. The litigation of the deportation proceeding by counsel for the Respondents was not an abuse of the judicial process	19
E. The Court of Appeals did not err in finding an abuse of discretion wherein the Board of Immigration Appeals denied the Motion based upon disregard of the immigration laws	27
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page
Acosta v. Gaffney, 413 F. Supp. 927, rev'd., 558 F.2d 1153	22
Arakas v. Zimmerman, 200 F.2d 322	11
Balani v. INS, 669 F.2d 1157	24
Bastidas v. INS, 707 F.2d 399	9
Batoon v. INS, 707 F.2d 399	5
Christiansburg v. EEOC, 434 US 412	19, 21
Citizens to Preserve Overton Park v. Volpe, 401 US 402	17
Hughes v. Rowe, 449 US 5	20-21, 23,27
INS v. Bagamasbad, 429 US 24	13
INS v. Phinpathya, No. 82-91 (Jan. 10, 1984)	9, 11, 15
INS v. Wang, 450 US 130	*passim*
Lam Chuen Ching v. INS, 467 F.2d 644	24
LeBlanc v. INS 715 F.2d 685	4, 23-25
Luna v. INS, 709 F.2d 126	14
Mendez v. Major, 340 F.2d 128	21-22
Morrissey v. Brewer, 408 US 471	16
Ramos v. INS, 695 F.2d 181	16, 29
Reyes v. INS 673 F.2d 1087	14
Rios-Pineda v. INS, 673 F.2d 225	*passim*
Rios-Pineda v. INS, 720 F.2d 529	*passim*
Shin v. INS, 750 F.2d 122	14, 16, 19, 26
Teamsters v. United States, 431 US 324	23
Valadez-Salas v. INS, 721 F.2d 251	22

TABLE OF AUTHORITIES—*(Continued)*

Cases:	Page
Vargas-Gonzalez v. INS, 647 F.2d 457	2
Villena v. INS 622 F.2d 1352	11-12
Wolff v. McDonnell, 418 US 539	16
Wong Hing Hang v. INS 360 F.2d 715	17
Woodby v. INS 385 US 276	20
STATUTES AND REGULATIONS:	
5 USC 706	17
8 USC 1101	21
8 USC 1153	27
8 USC 1182	*passim*
8 USC 1254	*passim*
42 USC 1983	20
42 USC 1988	20
8 CFR §3.2	*passim*
8 CFR §3.8	*passim*
ADMINISTRATIVE DECISIONS:	
Matter of Reyes 18 I&N Dec. 249	11, 14
MISCELLANEOUS:	
Davis, Administrative Law Treatise, Chap. 29.3	17-18
Tribe, American Constitutional Law, Sec. 10-8.	25

I. STATEMENT OF THE CASE

A. Factual Background

A deportation hearing was held on December 12, 1978 in Omaha, Nebraska in which the Respondents appeared before Immigration Judge Jessie M. Sellers. Most of the facts of record are gleaned from the 31 page transcript of that proceeding. (Pet. App. 80a-111a).

The Immigration Service on October 24, 1978 had initiated deportation proceedings against the Respondents by the issuance of an Order to Show Cause and Notice of Hearing. (Pet. App. 112a). This document alleged that the Respondents were not citizens of the United States, were natives and citizens of Mexico, and had illegally entered the United States on or about May 1, 1974. Counsel for the Respondents admitted these factual allegations. (Pet. App. 85a-86a).

Respondent, Bernardo Rios-Pineda, entered the United States for the first time in 1972. There is no clear statement as to when during that year this Respondent entered the United States. (Pet. App. 88a; 93a). Thereafter, he departed the United States for approximately two months during the year 1974. (Pet. App. 88a). Again, the precise circumstances of his departure are unclear. However, it is apparent that the Respondent was arrested by agents of the Immigration and Naturalization Service and that he departed the United States. Further, he was not provided a hearing before an Immigration Judge. (Pet. App. 88a-89a).

Thereafter, both Respondents entered the United States in May of 1974, paying a smuggler to assist them, $225.00 each. (id. at 96a).

At the time of the deportation hearing the Respondents had one United States citizen child and Respondent, Estarnilada Rios-Pineda de Rios, (herein after referred to as the "female respondent") was near to delivering a second United States citizen child. The male Respondent was em-

ployed and the Respondents were purchasing a home. Neither Respondent had a criminal record. (Pet. App. 76a).

B. History of the Case

At the deportation hearing on December 12, 1978 the attorney for the Respondents attempted to apply for suspension of deportation, though no formal applications were submitted. He also argued that the deportation of the Respondents would be unconstitutional in light of their United States citizen child. Counsel further argued that issuance of the Order to Show Cause was an abuse of discretion in light of a pending application for an alien labor certification, and lastly he applied for voluntary departure on behalf of the Respondents. All of the requested relief was denied. (Pet. App. 72a-79a).

Counsel for the Respondents then filed a timely appeal on December 20, 1978 to the Board of Immigration Appeals. Among the arguments made was that deportation of the Respondents would effect a "*de facto* deportation" of their citizen child. A brief was submitted to the Board of Immigration Appeals (Pet. App. 69a-70a). The Board of Immigration Appeals on May 30, 1980 dismissed the appeal rejecting the *de facto* deportation argument. The Board also rejected all of Respondents' other arguments. There was no discussion of the denial of voluntary departure. (Pet. App. 64a-68a).

The Respondents then filed a Petition for Review with the United State Court of Appeals for the Eighth Circuit. The Court in March of 1982 reversed and remanded for further proceedings, *Rios-Pineda v. INS*, 673 F.2d 225. The Court did not rule on any of the arguments made by the Respondents, except to note that the seven years required for suspension of deportation were undisputably met at that time.

The precise nature of the proceedings contemplated by the Court of Appeals was unclear. The Court quoted from *Vargas-Gonzalez v. INS*, 647 F.2d 457, 459 (5th Cir. 1981)

to the effect that a "*prima facie*" case entitling the Respondents to reopening upon the presentation of a proper procedural motion was appropriate. The Court further noted that the Respondents had made a substantial showing that they should be afforded relief on the basis of the evidence submitted. *Rios-Pineda*, at 227. However, the Court then remanded the case to the Board to permit the Respondents to submit a proper Motion to Reopen within a 60 day period and instructed the Board to rule upon the claim that they were entitled to suspension of deportation. *Rios-Pineda*, at 228. The Court plainly contemplated that a Motion to Reopen would be filed and that it would have to be carefully considered by the Board of Immigration Appeals. *Rios-Pineda*, at 228 n4 and n5.

On remand to the Board of Immigration Appeals the Board once again denied all relief. The Board ruled on July 16, 1982 and gave three basis for its decision. (Pet. App. 11a-15a). First, the Board held that the Respondents had not properly filed a motion within the sixty days provided by the Court of Appeals. The Respondents had mistakenly filed the motion with the Appellate Trial Counsel of the Immigration Service, rather than with the District Director in Omaha, Nebraska.

Secondly, the Board found that the Respondents did not set forth in their motion and supporting documents a *prima facie* case that would merit reopening and which would permit an application for suspension of deportation pursuant to §244(a)(1) of the Immigration and Nationality Act. The Court found that the Respondents did not establish a *prima facie* case of extreme hardship.

Lastly, the Board stated that in any event it would deny as a matter of discretion because it found that the appeals taken by the Respondents were "frivolous". The Board found that where eligibility for relief was gained by frivolous appeals or other dilatory actions that it would deny a Motion to Reopen as a matter of discretion. The Court also considered that the Respondents had used a paid smuggler and had failed to depart after being given voluntary depar-

ture by the Immigration Service, and the male Respondent having returned to the United States two months after having departed.

The Respondents then filed a second Petition for Review to the United States Court of Appeals for the Eighth Circuit. Once again, that Court reversed and remanded. See *Rios-Pineda v. INS*, 720 F.2d 529 (1983). The Court first found that the Motion to Reopen was properly filed and that the procedural error of counsel would not be given conclusive effect. *Rios-Pineda*, at 532.

The Court next found that the Board's denial of the Motion to Reopen for want of a *prima facie* showing of extreme hardship was in error. The Court noted that its normal standard for review of the Board's finding regarding a *prima facie* case of extreme hardship was an "abuse of discretion standard", citing this Court's decision in *INS v. Wang*, 450 US 139, 143, 144-145 (1981). The Court then went on to apply the "law of the case" doctrine. The Court interpreted its prior decision as requiring reopening. The Court further found that its prior decision was not "clearly erroneous" and hence was within the law of the case doctrine. *Rios-Pineda*, at 532-533. In any event, the Court found that the Board's denial for lack of extreme hardship was an abuse of discretion. *Rios-Pineda*, at 533 n3.

Lastly, the Court found the Board's denial as a matter of discretion to be in error. The Court assumed that the Board had the power to deny a Motion to Reopen to apply for suspension of deportation, even where a *prima facie* case had been established, in the exercise of its discretion. *Rios-Pineda*, at 534. The Court found that it could not accept the reasons given by the Board for its discretionary denial.

First, the Court rejected the Board's finding that the seven year period had accrued by the filing of "frivolous appeals". The Court found that a discretionary denial based upon abusive litigation could, under proper circumstances, form the basis of a denial of a Motion to Reopen, citing *LeBlanc v. INS*, 715 F.2d 685, 693 (1st Cir. 1983). The

Court then found that the petitions filed had not been frivolous. The Court noted that the petitions had resulted in the necessity of further proceedings.

The Court next rejected the Board's reliance on the use of a paid smuggler to deny the motion as "arbitrary, irrational, and contrary to the law", citing *Batoon v. INS*, 707 F.2d 399, 401 (9th Cir. 1983). The Court noted that disregard of the immigration laws in some form was essential to deportation proceedings. The Court therefore remanded to the Board with directions that it reopen the deportation proceedings for a full hearing before an Immigration Judge in order to determine whether suspension of deportation was merited.

The Solicitor General then petitioned this Court for a Writ of Certiorari which Writ has been granted. The Petition requested review only of the Court of Appeals reversal of the Board of Immigration Appeals denial as a matter of discretion. The propriety of the filing of the Motion and whether a *prima facie* case of extreme hardship existed were expressly not the subject of the Solicitor General's petition. Petition for Certiorari, pages 18-19 n14.

II. SUMMARY OF ARGUMENT

A. The Board of Immigration Appeals does have authority to deny motions to reopen to apply for suspension of deportation as a matter of discretion in proper cases.

Both abuse of the judicial and administrative system and disregard for the immigration laws under proper circumstances can form the basis of a proper denial by the Board of Immigration Appeals of such a Motion to Reopen. Neither the appeals taken by the Respondents, nor their "disregard" of the immigration laws justifies denial of their Motion as a matter of discretion.

B. The applicable regulations, 8 CFR §3.2 and 3.2, as well as §244(a)(1) of the Immigration and Nationality Act, grant broad discretion to the Attorney General and his del-

egates to deny motions to reopen to apply for Suspension of Deportation. However, this discretion is not unfettered.

The Board of Immigration Appeals can deny a Motion to Reopen to apply for suspension of deportation where it is apparent that the misconduct of the applicants will preclude their receiving the underlying relief requested. The Board's authority to pretermit further proceedings wherein the applicant presents an otherwise *prima facie* case for relief is limited to clear cases of misconduct which misconduct clearly outweighs any favorable facts apparent from the record. It is inappropriate for the Board to pretermit further consideration of a suspension application, absent such clear misconduct, as it is difficult to weigh the hardship that would occur to the American citizen children at this preliminary stage. The Board of Immigration Appeals is not free to arbitrarily pick and chose those Motions which it will reopen without rational basis.

C. The Court of Appeals applied the correct standard of review, that of "abuse of discretion."

This standard of review was correctly applied to the facts of this case and the Court of Appeals did not substitute its views for that of the administrative agency. The Court of Appeals did not improperly intrude on the prerogatives of the executive branch.

D. The litigation of the deportation proceedings including the appeal to the Board of Immigration Appeals and two Petitions for Review was not an abuse of the judicial process.

The litigation was not conducted in bad faith or utterly without a reasonable basis. The arguments advanced by the Respondents were not so clearly foreclosed as to amount to frivolous litigation.

The Court of Appeals correctly found that the Board's decision was contrary to law within the meaning of the abuse of discretion standard in that it relied upon factors not present in this record. The Court of Appeals correctly found that no abuse of judicial process had occurred.

E. The Court of Appeals correctly found that the Board of Immigration Appeals had abused its discretion insofar as it considered the Respondents' "disregard of the immigration laws" as a factor in denying the motion to reopen.

The Board of Immigration Appeals did not articulate any rational basis upon which to distinguish the actions of the Respondents from any other alien in deportation proceedings. Hence, the Government's argument that the Board of Immigration Appeals could distinguish between aliens in deportation based upon their degree of misconduct is misplaced.

III. ARGUMENT

A. The Board of Immigration Appeals has Authority to Deny Motions to Reopen to Apply for Suspension of Deportation in Proper Cases.

The Government petitioned this Court for certiorari to resolve one question. The question posed was whether the Attorney General and his delegates possessed discretion to deny a Motion to Reopen deportation proceedings for the purpose of seeking suspension of deportation under 8 USC §1254(a)(1) where it is alleged that the requisite seven years "continuous physical presence" was obtained by filing "frivolous appeals" and that the alien had in other ways exhibited disregard for the immigration laws. The United States Court of Appeals for the Eighth Circuit answered both parts of the posed question in the affirmative.

The Court of Appeals declined to follow Ninth Circuit precedent and find that the Board lacked authority to deny a Motion to Reopen to apply for suspension of deportation once a *prima facie* case of eligibility has been established. *Rios Pineda v. U.S. Dept. of Justice, INS*, 720 F.2d 529, 533 (1983). The Court assumed that cases from the First Circuit and statements from this Court's decision in *INS v. Wang*, 450 US 139, 143 and 145, were to be applied and

that the Board could deny the alien's Motion to Reopen "in the exercise of discretion." *Rios Pineda*, at 534.

The Court of Appeals further conceded, "While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, (citation omitted), the appeals and petitions for review in this case do not fall into the 'frivolous' category." *Rios-Pineda*, at 534.

Lastly, the Court did not categorically reject the "disregard" of the immigration laws as a proper factor to support a denial of a Motion to Reopen as a matter of discretion. The Court found that the "disregard" in this case was of a kind necessarily present in most deportation proceedings and that the Board's reliance on that factor was "arbitrary, irrational, and contrary to the law." (Citation omitted) *Rios-Pineda*, at 534.

It is important to note at the outset that the Court of Appeals did not disagree with the answer suggested to the question posed in the Certiorari Petition by the Solicitor General. The rhetoric contained in the Government's Brief would lead one to believe that the Court of Appeals had acted in a manner completely at odds with its view of the proper application of the immigration laws. Such is not an accurate preception. This case involves a narrow issue regarding the *application* of legal precepts to a particular set of facts.

Like the Court of Appeals, the Respondents concede that the Board of Immigration Appeals has authority to deny a Motion to Reopen as a matter of discretion in a proper case both because the seven years of continuous physical presence were obtained as a result of appeals that amounted to an abuse of the judicial and/or regulatory process and/or the record contained unequivocal evidence of disregard of our immigration laws to such an extent as to clearly outweigh any favorable factors and favorable inferrences that are apparent from the record.

As will be developed *infra*, the Respondents will set forth their detailed disagreement with the Government re-

garding the nature of the discretion to be exercised by the Board as well as the application of the legal precepts to the facts of this case.

The Respondents will first consider the statutory and regulatory frameword of the Immigration and Nationality Act and Regulations as applied to this case. The Respondents will next consider the appropriate scope of appellate review. Lastly, the Respondents will address whether the Respondents' Motion to Reopen was properly denied in the exercise of the Board's discretion based on "frivolous appeals" and "disregard" of the immigration laws.

B. Statutory and Regulatory Framework.

Suspension of deportation is a remedy provided by section 244(a)(1) of the Immigration and Nationality Act, 8 USC §1254(a)(1). The remedy is available for persons having seven years of continuous physical presence in the United States; see *INS v. Phinpathya, No. 82-981 (Jan. 10, 1984)*; persons who have been of good moral character for the required seven years; and persons who in the opinion of the Attorney General would suffer extreme hardship or their citizen or permanent resident spouses, children, or parents would suffer extreme hardship.

The statutory eligibility requirements are prefaced by a grant to the Attorney General to determine "in his discretion" whether to suspend deportation and adjust the status of an alien to one lawfully admitted for permanent residence. Thus, an alien claiming susupension of deportation must establish continous physical presence and good moral character as a matter of law. Further, he must convince the Attorney General in his discretion that he and/or designated family member(s) would suffer extreme hardship. Lastly, he must convince the Attorney General that he merits a favorable exercise of discretion. *See Bastidas v. INS*, 609 F.2d 101, 102-104 (3rd Cir., 1979).

Motions to Reopen deportation proceedings in general are governed by regulations of the Department of Justice found at 8 CFR §3.2 and §3.8

8 CFR §3.2 provides, *inter alia*, for a Motion to Reopen to be filed by a party affected by a decision. Motions,

> . . . shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former deportation hearing; nor shall any Motion to Reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

8 CFR §3.8 is essentially procedural. 8 CFR §3.8(a) requires Motions to Reopen to state the new facts to be proved and requires affidavits or other evidentiary material. See *INS v. Wang*, *supra*, at 143. §3.8(b) and (c) govern the distribution of Motion papers and subsection (d) governs rulings on the Motion

Reading the Government's Brief, one would assume that a great deal more is said in these provisions than is actually there. These provisions set forth a relatively simple and orderly procedure for the filing of Motions to Reopen. There is little of a substantive nature. 8 CFR §3.2 does require as a predicate to the opening of deportation proceedings that the evidence sought to be offered be material, not have been available and which could not have been discovered at the time of the former hearing. Further, the discretionary relief sought must not have been available and if available, such availability have been made known to the alien at the former hearing. As applied to this case, the only relevant requirements of the regulations are that the evidence submitted be material and that the availability of

the evidence have arisen subsequent to the deportation hearing on December 12, 1978.

Unlike its predecessor, these regulations do not grant to the Attorney General express discretion to deny Motions to Reopen. See *Arakas v. Zimmerman*, 200 F.2d 322, 323-324 n2 (3rd Cir. 1952), cited in *Matter of Reyes*, 18 I&N Dec. 249, 253 (BIA 1982). Even the Board itself considers its authority limited to its "sound discretion". *Matter of Reyes*, *supra*, at 353.

Were this Court writing on a clean slate, the Government's claim of broad discretion based upon these regulations would be in substantial doubt. Motions to Reopen are expressly not to be granted unless the requirements set forth above have been met. Given normal canons of construction, it may well have been inferred where these two requirements were met that Motions to Reopen should be granted. The use of the permissive word "may" appears in the first sentence and appears to modify only the Board's authority to reopen on its own Motion. The word may does not appear to apply to Motions submitted by "an affected party".

However, this Court has stated in *INS v. Wang*, 450 US 139, 143 and 145, that the regulations may be construed narrowly, as they are framed in the negative, to provide the Board with discretion to determine under what circumstances proceedings should be reopened, citing *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980) (en banc) (Wallace, J., dissenting), and quoting Judge Wallace regarding the broad scope of INS discretion with regard to Motion to Reopen.

Last term, in *INS v. Phinpathya*, No. 82-91 (Jan. 10, 1984) this Court stated, "Although Respondent has filed a Motion with BIA asking that her deportation proceeding be reopened, the granting of the Motion is entirely within BIA's discretion. See 8 CFR §3.2 (1983); *INS v. Wang*, 450 US 139, 143-144, 144 n5 (1981)." See Slip.Op. at p.5, n6. While neither of these statements is the holding in the case before the Court, each is a strong indication that the Board

possesses discretionary power over Motions to Reopen deportation proceedings. It is important to remember that the primary issue in *Wang* was whether the Court of Appeals had exceeded its authority in substituting its own judgement as to what constituted "extreme hardship" where that determination had been committed by the text of the statute to the Attorney General. The issue before the Court in *Phinpathya* was whether the "continuous physical presence" requirement had been met. The quote cited above arose in a context in which the Court was dealing with the Respondent's assertion that the case before the Court was moot. Neither statement of this Court was in the context of a holding regarding the nature of the Board's authority.

This Court's citation to Judge Wallace's dissent in *Villena* as well as the Court's own language reveal that the Government's claims for "unfettered" discretion is without foundation in this Court's recent decisions. In *Wang*, after finding the Court of Appeals for the 9th Circuit had committed an error in ignoring the text of 8 CRF §3.2 and §3.8 as to the form of evidence which must be submitted, this Court stated:

> By requiring such a hearing on such a Motion, the Court of Appeals circumvented this aspect of the regulation, which was obviously designed to permit the Board to select for hearing only those Motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children. (Footnote omitted) (Wang, at 143)

This quoted passage indicates the Court's concern that the Board's regulations be strictly adhered to so that the Board could easily identify those cases which met the requirements of the regulations. Further, footnote 5 which follows this passage refers to Judge Wallace's dissenting opinion in *Villena*. A reading of Judge Wallace's dissenting opinion reveals that his primary concern was that the 9th Circuit's decision would require the Board to reopen deportation proceedings for fruitless and wasteful hearings

before immigration judges. Judge Wallace was concerned that the Board need not reopen deportation proceedings where an alien made out a *prima facie* showing of statutory eligibility, but where the Board would deny the application in any event as a matter of discretion. Thus, even where an alien could demonstrate that he met the extreme hardship requirement, the Board could deny as a matter of discretion under its statutory authority under 8 USC 1254(a)(1), as there would be no point in granting the Motion to Reopen as the application would in any event be denied.

The Respondents do not question the soundness of Judge Wallace's observations. The Board ought not be required to grant a Motion to Reopen where the underlying substantive relief sought will not be granted as a matter of discretion. Cf *INS v. Bagamasbad*, 429 US 24 (1976). However, the Government goes much further and argues that the Board has authority to determine ad hoc and without standards whether an individual merits reopening independent of any statutory guidelines. Petitioner's Brief, 17-22. None of the cases cited by the Government supports the claim for "unfettered" ability to pick the motions that will be granted.

Since this Court's prior decisions indicate that the Board has broad authority to grant Motions to Reopen and since in any event the Board plainly has authority under the underlying statute to deny the discretionary relief as a matter of discretion, the Respondents do not question the authority of the Board to deny Motions to Reopen as a matter of discretion where suspension of deportation is sought even where a *prima facie* case is otherwise set forth. The use of the term "*prima facie* case" is somewhat misleading in this context. Part of the applicant's *prima facie* case is to demonstrate that he merits reopening as a matter of discretion pursuant to the underlying statute. Thus, where he has not demonstrated that he merits the relief sought as a matter of the Attorney General's discretion, then he has not set forth a *prima facie* case. Cf. *INS v. Bagamasbad, supra*.

The Respondents' disagreement with the Government is over the breadth of the Board's authority. In a case of an application for suspension of deportation, that authority under the regulations is coextensive with the authority under the statute itself. See *Shin v. INS*, 750 F.2d 122, 125 (D.C. Cir. 1984). Where the Board finds that substantial adverse factors exist in the record which plainly outweigh favorable factors, then no further proceedings are required as the moving party will not obtain the relief requested in any event. This makes further proceedings unnecessary for all of the parties.

It is important to note that at this preliminary stage it is sometimes difficult to rule upon a Motion to Reopen to apply for suspension of deportation. The degree of hardship to be weighed is difficult to ascertain. See *Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir. 1982) and *Luna v. INS*, 709 F.2d 126, 128 (1st Cir. 1983). The Board asserts that it has authority to deny Motions to Reopen for suspension of deportation based on discretionary factors. As noted above, the Respondents do not disagree with this position in the abstract. It is the application to the case at bar and to other cases with which the Respondents take issue. A Motion to Reopen is an inappropriate procedural stage in which to sift, and weigh facts. Where a case presents a fair issue of eligibility as a matter of discretion, and where it is difficult to ascertain the particular hardship that would be entailed, the Board should not be permitted to pretermit further proceedings. There are cases where it is plain that the Board will and should be permitted to pretermit further consideration. See *Matter of Reyes*, 18 I&N Dec. 249, 254 (BIA, 1982) where the alien attained the necessary seven years by absconding.

As the 1st Circuit Court of Appeals has noted in *Luna v. INS*, *supra*, it is difficult to ascertain the degree of hardship without a hearing. Where the alien's conduct does not plainly indicate that he will not be afforded the ultimate relief, pretermittion is not appropriate.

As will be developed *infra*, the case at bar is not a case where the alien's conduct so plainly demonstrates ineligibility for the underlying relief that the Board should be permitted to pretermit further proceedings, notwithstanding that the three statutory requirements have been met. It is important to note that the Government has not petitioned for certiorari regarding the Court of Appeal's finding that the extreme hardship requirement has been met. See Petition for Certiorari at pp. 18-19 n14. Thus, this Court is presented with a case in which the Respondents have established a *prima facie* case of seven years continuous physical presence, good moral character, and that their citizen children would suffer extreme hardship were they deported. The sole question posed is whether the Board may in its discretion, on these facts, pretermit further proceedings based upon their conduct.

The Government states that the Attorney General in considering the Respondents' Motion was to consider: 1) whether the new evidence warranted reopening the proceedings, 2) whether the statutory requirements for eligibility for suspension relief had been satisfied, and 3) whether that relief was likely to be granted. Petitioner's Brief at 12-13. This is analytically incorrect insofar as it purports to separate the consideration of the first factor from the third factor. Whether reopening is warranted may not be considered separately from whether the relief was likely to be granted, at least in the suspension context. Whether the Board abuses its discretion in denying a Motion to Reopen should be gauged by whether its decision is rational in light of the possibility of relief being obtained.

The government argues for an independent basis upon which to deny Motions separate and apart from the underlying relief sought. Other than the indications of such authority which it extrapolates from this Court's *Wang* and *Phinpathya* footnotes, the Government offers a paucity of authority for this proposition.

First, the government argues that because the Attorney General created the Motion to Reopen he should be afforded considerable deference to determine whether its requirements had been met. See Petitioner's Brief at pp. 17-18. The Government cites no history of the regulations or any other convincing authority for this proposition.

It is well established that once having created an entitlement, even where such entitlement was not otherwise required, governmental entities must then utilize fair procedures to determine who should receive the governmental benefit created. See *Wolff v. McDonnell*, 418 US 539, 557-558 (1974) and *Morrissey v. Brewer*, 408 US 471, 481 (1972). The Government is not free to arbitrarily pick and choose those whom it deems to not merit reopening without relation to the underlying relief sought. *Shin v. INS*, supra, at 125, 127.

This seeming nuance of interpretational disagreement is of significance. While the Board's claim of authority purports to be a balancing test, it is no such test at all. As applied by the Board, the principle of discretion permits a one-sided review of the record. Where the Board simply identifies what it considers to be significant negative factors, the Motion is denied. As interpreted by the Respondents in the suspension application context the duty of the Board is to review the record as a whole and to pretermit further proceedings only where it is plain that underlying relief cannot be granted, notwithstanding careful consideration of the favorable factors contained in the record. Cf. *Ramos v. INS*, 695 F.2d 181, 185-188 (5th Cir. 1983) and *Shin v. INS*, supra.

C. The Court of Appeals for the Eighth Circuit Applied the Correct Standard of Review.

The United States Court of Appeals considered the Board's discretionary denial on an "abuse of discretion standard". It is not disputed that this is the correct standard

of review. It is only the application of this standard to the facts of this case which is in conflict.

What constitutes an abuse of discretion is a matter often considered by this Court and other courts. Precise definition is difficult. See generally, Davis, 5 Administrative Law Treatise, Chapter 29.3. This Court in *Citizens to Preserve Overton Park v. Volpe*, 401 US 402 (1971), reviewed 5 USC §706(2)(A), of the Administrative Procedures Act, to ascertain the meaning of the terms "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe, supra*, at 416. This Court instructed that in reviewing a determination, inquiry is made as to whether the decision maker's ultimate choice involved a consideration of the relevant factors and whether there was a clear error of judgement. Among cases cited by the Court was the decision in *Wong Wing Hang, v. INS*, 360 F.2d 715, 719 (2nd Cir. 1966).

This Court instructs that the Court of Appeals is not empowered to substitute its judgement for that of the agency. See *Overton Park*, at 416. However, the decision must not be without rational explanation, inexplicably depart from established policy or rest on an inpermissible basis or on other considerations Congress could not have intended to be relevant, *Wang Hing Hang v. INS, supra*, at 719. (per Friendly, J.). Further, pursuant to the *Overton Park* decision, where a clear error in judgement has been made, a Court of Appeals is entitled to set aside the agency's decision.

The Court of Appeals herein found the Board's discretionary denial to be an abuse of discretion with regard to the alleged "frivolous appeals" as lacking in a legal basis. Simply put, the Court of Appeals did not find that the appeals taken were frivolous.

It is important to note at this point that a judgement as to whether appeals are frivolous is not within the agency's expertise. No particular deference is merited to an agency's judgement in this regard. The Courts are frequently called

upon to make such determinations and are the real experts in this type of decision making. Thus, applying well established principles of administrative law, less deference is due an administrative agency when making this type of determination than where it applies its peculiar expertise in a narrow area of law. See Davis, Administrative Law Treatise, Chapter 29.3, pp. 343-344.

Secondly, the Court of Appeals found an abuse of discretion with regard to the alleged disregard of the immigration laws. The Court of Appeals found that this type of disregard of the immigration laws was inherent in most deportation cases and thus found the Board's reasoning irrational or based upon considerations not intended by Congress. *Rios Pineda*, at 534.

The Court of Appeals expressly did not substitute its own judgement for that of the Board. The Court held that the Board had not satisfactorily explained why the Respondent's conduct was a particular abuse of the immigration laws not inherent in deportation proceedings. 8 USC §1254(a)(1) requires as a prerequisite to relief that an alien be "deportable".

The government states "The Court of Appeals committed serious error by failing to accord any geniune deference to the Board's exercise of its discretion.", Petitioner's Brief at 29. The Government cites no particular aspect of the Court of Appeal's decision to support this contention. A careful review of the text of the Court of Appeals decision reveals considerable deference to the Board. The Court of Appeals adhered to traditional guidelines for reviewing an agency action on an "abuse of discretion standard". The Court premised its consideration of the subject by citation to this Court's decision in *INS v. Wang, supra*, at 143 n5. Obviously, it was mindful of the limits upon its authority.

Singing its ode to discretion, the Government fails to point out with any precision what the Court of Appeals did that was beyond its authority. The Government merely argues that the Attorney General has "unfettered" authority to deny Motions. This argument is overblown and does not

correctly delineate the appropriate and traditional balance between the broad authority of an administrative agency and the appropriate role of a Court of Appeals in reviewing that agency's decision on an "abuse of discretion" standard. While the Court's authority is limited the Board's authority is not unlimited, hence meaningful review in the Courts continues to exist. See *Shin v. INS*, supra.

D. The Litigation of the Deportation Proceeding by Counsel for the Respondents was not an Abuse of the Judicial Process.

The Board and the Government argue that the course of litigation by Counsel for the Respondents was frivolous in conducting this litigation. The Board found and the Government argues that it then follows that the Respondents should be deprived of their opportunity to present their suspension application to an Immigration Judge and that they should be deported from the United States forthwith, notwithstanding any present merit in that application. Quite simply, this is an extraordinary sanction to be imposed.

As noted above, the Respondents concede that the sanction may be imposed in proper cases. However, it should be imposed carefully and only where justified.

Neither the Board nor the Government suggests a standard, other than their own subjective perception as to what constitutes frivolous litigation, or even why standards ought to be set at the "frivolous" level.

This Court has twice dealt with the analogous issue of when attorney's fees ought to be awarded to a prevailing defendant in Title VII litigation and in a 42 USC 1983 proceeding. In *Christiansburg Garment Company v. EEOC*, 434 US 412, 421-423 (1978), this Court considered when a prevailing defendant ought to be awarded attorney's fees under Title VII of the Civil Rights Act. The Court held that where litigation was unreasonable, meritless or vexatious, attorney's fees should be awarded. The Court found that

the term meritless should be understood to mean groundless and without foundation. The fact that a plaintiff had lost was not in and of itself sufficient to meet that standard. However, the term vexatious was to be understood as not requiring subjective bad faith.

The Court held that where the EEOC had proceeded on a question of first impression and whose contention was not frivolous, attorney's fees would not be awarded.

Two years later in *Hughes v. Rowe*, 449 US 5 (1980), in a *per curiam* decision, this Court reversed a Court of Appeals that had awarded a $400 attorney's fee against a prisoner proceeding *pro se* pursuant to 42 USC §1983. This Court interpreted 42 USC §1988 to award fees only where the *Christiansburg* standard had been met. This Court then reviewed the plaintiff's contentions and found that at least one of the issues raised merited further consideration and, hence, vacated the award of attorney's fees. This Court noted that where even the Court of Appeals, in rejecting the plaintiff's claims had issued a seven page opinion giving detailed treatment to the plaintiff's claim, that this was a strong indication that it was not frivolous litigation.

It is well settled that deportation proceedings are civil in nature. However, it is equally well settled that deportation proceedings are of such import to the alien that an increased burden of proof over that normally utilized in civil cases is warranted. See *Woodby v. INS, 385 US 276 (1966)*. Thus, an attorney's role in a deportation case may analogized in certain respects to criminal counsel. Counsel may legitimately consider himself bound to raise every arguable issue on behalf of his client. Because one or more of these arguments is found to be lacking in merit does not make litigation as a whole meritless.

The Government in its brief follows the lead of the Board in pointing to certain aspects of the litigation finding them meritless. Petitioner's Brief at 23-27.

It is submitted that the litigation as a whole was not utterly without a reasonable basis.

BEST AVAILABLE COPY

Before considering the details of the litigation below, the Respondents believe that the applicable standard should be at minimum the *Christiansburg* standard. The Board and the Courts should not be quick to infer an abuse of the judicial process by the rejection of the ultimate relief requested. The standard is whether the litigation as a whole is so lacking in merit as to present conclusive evidence of bad faith or have been so recklessly litigated as to be meritless in the *Christiansburg* sense. It is important to note that the correct analysis is that utilized by this Court in *Hughes v. Rowe* in focusing on whether any of the issues raised merited review.

The Respondents' primary contention before the Immigration Judge, the Board and the Court of Appeals on the first petition was that the deportation of the Respondents would effect a "*de facto* deportation" of the citizen child. The Government contends that this position was utterly foreclosed at the time that it was raised. A careful review of the decisions rendered at that time do not support the Government's position.

First, this litigation took place within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. In *Mendez v. Major*, 340 F.2d 128, 131 (8th Cir. 1965), that Court rejected a claim that aliens subject to the two-year foreign residence requirement of §212(e), 8 USC 1182(e), must be afforded a waiver of that requirement wherein they had a United States citizen child. This decision arose in the context of an application by aliens subject to the two-year residence requirement as exchange aliens pursuant to §101(a)(15)(J), 8 USC 1101(a)(15)(J), and §212(e) of the Immigration and Nationality Act. Such aliens entered the United States with the knowledge that they were required to depart at the conclusion of their visa. The Court of Appeals decision relied expressly on Congressional power to determine conditions underwhich aliens may enter or remain in the United States. The Court relied for authority upon cases dealing with that authority. See *Mendez v. Major*, supra at 131-132.

The *Mendez* decision was not binding upon the Respondents. It simply did not raise the issue of *de facto* deportation of U.S. citizen children. The Respondents case arose in deportation proceedings. Their contention was to be considered in a different procedural and substantive context.

The Respondents argued that their child and later children were sufficiently assimilated into American life that deprivation of this status would be unconstitutional. This argument differs from that offered in the §212(e) context wherein the aliens themselves entered knowing that they must depart within a set time frame. The Respondents' claim was not definitively rejected in the Eighth Circuit until *Valadez-Salas v. INS*, 721 F.2d 251, 252 (8th Cir. 1983).

Moreover, one District Court had accepted the Respondents' argument subsequent to the Eighth Circuit decision. See *Acosta v. Gaffney*, 413 F. Supp. 827 (D.N.J., 1976), reversed at 558 F.2d 1153 (3rd Cir. 1977). Although ultimately reversed, Judge Stern's opinion was a forceful argument for the proposition asserted by the Respondents. The District Court relied upon its reading of at least one Circuit's authority for the proposition that a *de facto* deportation would be unconstitutional.

The Court of Appeals noted that the Supreme Court had never directly spoken on this issue, *Acosta v. Gaffney*, *supra*, at 1158 n5. However, it agreed with other Circuits which had rejected the claim.

The Respondents do not herein argue that this Court should affirm based upon the *de facto* deportation argument. What they do argue is that the raising of this issue was not foreclosed by precedent and was not frivolous. A noted United States District Court Judge had agreed with the Respondents' position. The fact that it was later reversed by a Court of Appeals does not render that Judge's decision frivolous. Likewise, the Respondents' contention does not become frivolous simply because a number of Courts' have rejected it.

In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court construed §703(h) of Title VII in a manner that overruled at least six United States Courts of Appeals and decisions in at least 30 cases. There had not been a dissenting opinion in any of those decisions. See *Teamsters v. United States, supra*, at 378-379, n2, (Marshall dissenting.). Nevertheless, this Court found merit in the Petitioner's arguments. Simply because a number of Courts have ruled to the contrary does not make the argument frivolous.

Utilizing the analytical framework of *Hughes v. Rowe*, *supra*, should one of the issues raised by the Repondents have been meritorious, then it may not be said that the appeals were frivolous. As outlined above, it is submitted that the "*de facto* deportation" issue, though not ultimately of sufficient merit to permit the Respondents to prevail was not frivolous or an abuse of judicial process. It is unnecessary for the Respondents to justify each and every claim raised below. These claims did not serve to prolong the litigation, nor did they multiply its complexity. Hence, they are essentially irrelevant.

The essential thrust of the Government's brief is that the Court of Appeals has encouraged frivolous and dilatory tactics by their method of review of the Board's determination that the Respondents had filed frivolous appeals. The Court of Appeals merely noted that as a result of the two petitions for review, further proceedings had been found to be necessary. *Rios Pineda*, at 534. While it is certainly true that more extensive discussion from the Court of Appeals would have been helpful, it is not apparent that the Court of Appeals would take this view in subsequent cases.

The Court stated:

> While in some cases an abuse of judicial processes might be a factor relevant to a discretionary refusal to reopen deportation proceedings, see *LeBlanc v. INS*, *supra*, 715 F.2d at 693, the appeals and petitions for review in this case do not fall into the "frivolous" category. Indeed, this Court has now twice considered

> petitions, which regardless of their ultimate success, have required further proceedings to fully and fairly decide the petitioner's claim of their right to stay in this country. *Rios Pineda*, at 534.

The Government focuses entirely upon the second sentence and ignores the first sentence. It is apparent that the Court of Appeals did consider whether the petitions filed were themselves frivolous separate and apart from the further proceedings that the passage of time necessitated. The Court expressly cited *LeBlanc v. INS*, *supra*, and did note that the Board could deny based on frivolous appeals in an appropriate case.

In *LeBlanc v. INS*, the First Circuit held that the Board had the power to deny a Motion to Reopen to assert a suspension claim as a matter of discretion. The Court went on to review the Board's decision on an abuse of discretion standard, citing *Balani v. INS*, 669 F.2d 1157, 1160 (6th Cir. 1982). See *LeBlanc v. INS*, *Supra* at 693. The Court went on to uphold as rational the Board's reliance on the factor of frivolous appeals and dilatory tactics. In that case, Petitioners argued that their delaying tactics were themselves favorable considerations. See also *Lam Chuen Ching v. INS*, 467 F.2d 644, 645 (3rd Cir. 1972).

There is no inconsistency between the decision of Court of Appeals herein and the decision of the First Circuit. The Court of Appeals for the Eighth Circuit applied the same legal precept, that the Board could deny as a matter of discretion where the seven years were obtained by frivolous litigation.

Further, the Court reviewed by the same standard of review, "abuse of discretion". The explication of that standard by the Courts is nearly identical. Compare *Rios-Pineda*, at 534, and *LeBlanc v. INS* at 693. The Court in *Rios-Pineda* differed only in that it found the appeals that were taken were not frivolous.

While the standard of review of the Board's determination is that of an "abuse of discretion", less deference is

due the Board when its decision rests on essentially a judicial basis and not on factors within their particular expertise. This is especially true where the large part of the allegedly frivolous litigation took place before the Court of Appeals.

The government acknowledges that the Board does permit applications for suspension where the seven years were accrued during the pending of appeals. Petitioner's Brief at 33, n21. Thus, the Board does distinguish between cases where the seven years have accrued on a non-frivolous basis. The Board's decision is based upon its review of this record and does not involve a particular application of its expertise regarding the immigration laws.

The Government further argues in its Brief that the decision of the Court of Appeals rewards dilatory tactics. Petitioner's Brief at 30-33. Under the Court of Appeals analysis, the Board retains the discretion to deny Motions as a matter of discretion in abusive cases. The Court of Appeals will only step in where that discretion is abused.

In general, the Petitioner argues for unbridled discretion of the Board of Immigration Appeals. The Respondents do not quarrel with the need for the Board to retain flexibility and discretion in considering Motions to Reopen. A restrictive standard of review is appropriate and was in fact employed by the Court of Appeals herein.

The Government's argument in this case harkens back to a time when the Courts distinguished between rights and privileges. This argument has been long rejected in the due process area. See Tribe, American Constitutional Law, Sec. 10-8, pp 509-510 (1978). Simply because an alien does not have a right to have his deportation proceedings reopened, does not mean that he is not entitled to a fair and careful consideration of the Motion. Having held out a remedy, the Board may not dispense the remedy without a rational basis. *Shin v. INS*, supra.

The Government further argues that the seven year requirement of 8 USC §1254(a)(1) will become a nullity as a result of the Court of Appeal's decision. Petitioner's Brief

at 30-33. This argument is obviously overblown. The solution to this problem lies with the agency itself. See *Shin v. INS*, supra, at 130-131, (dissent). Although charged with being deportable in 1978, it was nearly two years later when the Board affirmed the orders of deportation. The Board itself failed to promptly dispose of these cases.

Moreover, as noted above, the Board retains the authority to deny Motions as a matter of discretion based upon an appropriate record of dilatory tactics.

The Respondents applied for voluntary departure pursuant to §244(e) of the Immigration and Nationality Act. The Immigration Judge denied this application. While neither the Respondents notice of appeal or brief raised this issue before the Board, the Board plainly had authority to consider it. See 8 CFR §3.1(c).

By denying voluntary departure, the Immigration Judge subjected the Respondents to the bar of §212(a)(17) of the Immigration and Nationality Act, which at the time of his decision, would have been a permanent bar to their return as permanent residents. The issue of voluntary departure was a close one and plainly merited appeal to the Board and into the Courts.

The Court of Appeals considered the issue of voluntary departure pursuant to 8 USC §1254(e) as properly before them. See *Rios-Pineda v. U.S. Dept. of Justice*, 673 F.2d 225, 226 (8th Cir. 1982). The Court did not address the issue because it remanded on other grounds. Certainly, the denial of voluntary departure posed a non-frivolous issue separate and apart from the grounds discussed above. This is particularly so wherein the Respondents had a possibility of immigrating to the United States based on the employment of the male Respondent. See §212(a)(14) and §203(a)(6) of the Immigration and Nationality Act, 8 USC 1182(a)(14) and 1153(a)(6).

In summary, taken as a whole, the appeals taken by the Respondents where not so frivolous as to amount to an abuse of the judicial or administrative process that merited the denial of their suspension application without reference

to its merits. The Board abused its discretion in denying the Motion wherein the petitions where not frivolous as a matter of law. Cf *Hughes v. Rowe*, supra.

E. The Court of Appeals did not Err in Finding an Abuse of Discretion wherein the Board of Immigration Appeals Denied the Motion Based upon Disregard of the Immigration Laws

The Board also relied upon the Respondents' use of a paid smuggler to help them avoid inspection, the male Respondents' return after a forced absence of only two months and the failure to depart voluntarily, in the denial of the Motion. (Petitioner's Appendix 13A-14A). It is not apparent whether this served as a independent basis separate and apart from the perceived lack of merit in the Respondents' appeals. More likely, these grounds appear to be cumulative factors in the Board's consideration. From a reading of the Board's opinion, it cannot be said that these basis would have independently led the Board to deny the Motion.

It is important to note that the Board merely mentions these factors. The precise nature of these events, and even the Board's formulation of them, are in grave question based upon this record.

The only fact that is clear is that the Respondents paid $450 to a smuggler to enter the United States. Whether that occurred in 1972 or 1974 is not clear from the record. See Brief for Respondent, supra at 1.

The nature of the circumstances under which the male Respondent departed the United States in 1974 are quite unclear. See *Brief for Respondents, supra* at *pg. 1*. Most puzzling, is the Board's statement that "prior to the male Respondent's departure, he had been granted administrative voluntary departure which was extended once and he nevertheless failed to depart voluntarily." (Pet. App. 13a.) If the Board is to be understood as utilizing the term "voluntary departure" in its technical and not normal usage, the statement is inexplicable. First, nothing in the record be-

fore this Court or before the Court of Appeals evidences the Board's statement of facts. It appears that the Board is relying on some information, probably contained in the Immigration Service file, which was not made of record in the deportation proceeding. Moreover, the male Respondent's departure could not be considered to be a deportation, as no judicial proceedings had ever been commenced. Further, the Government never charged either in deportation proceedings or in criminal proceedings that male Respondent re-entered the United States after having been deported.

Once again, the Respondents do not contest the Board's discretionary ability to deny a Motion to Reopen based upon "disregard of the immigration laws". In an appropriate case, disregard for the laws of the United States may well form an independent and compelling basis upon which to deny a Motion to Reopen. Once more, this is not such a case.

As the Court of Appeals noted, disregard of our immigration laws is necessarily present in some form in most, if not all, deportation proceedings. *Rios-Pineda*, at 534. The government argues in its Brief that the Board has the power to distinguish among deportable conduct to decide which merits the sanction of a preemptory denial of a Motion to Reopen. Brief for Petitioner at 37. Counsel for Respondent does not quarrel with this formulation. However, there is no indication in the Board's decision that it did so. As noted above, these factors appear to have been considered as cummulative factors that supplemented and re-enforced the Board's findings of the perceived lack of merit in the underlying litigation.

Nothing in the Board's decision distinguished the Respondents from "simple overstays". If the Board is going to make such determinations, it must do so expressly and with rational explanation. Cf. *Ramos v. INS*, supra, at 185-188.

It is indisputable that an alien must be "deportable" to apply for suspension of deportation. Such is a statutory prerequisite. Thus, it is incumbant upon the Board to distin-

guish the egregious offenders from the less offensive. Nothing in the Respondents' conduct identifies them as such egregious offenders.

The Government makes the astonishing argument that "just as a fugitive from justice is not entitled to pursue relief through the Courts, an illegal alien who remains in the country by evading valid orders to depart should not be entitled to discretionary administrative relief from deportation." Petitioner's Brief, at 37. This argument entirely overlooks the nature of the suspension of deportation remedy. The Government's position would be a *pro tanto* repeal of the suspension statute insofar as discretionary administrative relief is concerned.

The Government further argues as if the Respondents had been fugitives who had absconded to accure the necessary seven years. This is completely without factual basis in this record and if argued by analogy is simply inapt. Whether the Board can deny a Motion to Reopen where the alien's acquire seven years by absconding is not before the Court. For present purposes, Respondents can readily assume that such a denial would be proper. The disregard of the immigration laws discussed by the Board does not in any way relate to the argument advanced by the Government.

Once again, the Government alludes to a crushing administrative burden on the INS. See Petitioner's Brief, at 39. No support for this assertion is apparent from the record and none is suggested by the Petitioner. The Government appears to be arguing for the ability of the Board to deny Motions wholesale without consideration of the individual merits of each.

The cases cited by the Government are simply inapposite to the principle asserted. None of these cases support the argument made.

In summary, the Respondents accept the authority of the Board of Immigration Appeals to deny Motions to Reopen based upon egregious "disregard of the immigration laws". No such egregious disregard was found by the Board

as an independent basis of denying the Motion. Moreover, the Board utterly failed to distinguish the disregard present in this case from that present in any Motion to Reopen to apply for suspension of deportation.

IV. CONCLUSION

The Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals and remand for further proceedings consistent with this Court's opinion and that of the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Lawrence H. Rudnick
ORLOW, FULLER, RUBIN & STEEL
936 Public Ledger Building
Philadelphia, PA 19106
(215) 922-1181

Roman de La Campa
2219 Allan Street
Sioux City, Iowa 51103
(814) 258-8852
Counsel for Respondents

March 4, 1985

(6)

No. 83-2032

Office - Supreme Court, U.S.
FILED
MAR 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BERNARDO RIOS-PINEDA AND
ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13R

TABLE OF AUTHORITIES

Page

Cases:

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 ..... 6, 7, 8

Hughes v. *Rowe*, 449 U.S. 5 9

ICC v. *City of Jersey City*, 322 U.S. 503 3

INS v. *Phinpathya*, No. 82-91 (Jan. 10, 1984) 3

INS v. *Wang*, 450 U.S. 139 ..... 2, 3

Mendez v. *Major*, 340 F.2d 128 ..... 8, 9

Reyes, In re, 18 I. & N. Dec. 249 3

United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 3

Valadez-Salas v. *INS*, 721 F.2d 251 9

Statute and regulations:

8 U.S.C. 1105a(a)(3) 4, 7

8 C.F.R. :

Section 3.6(a) 4, 7

Section 3.8(a) 2

Miscellaneous:

11 C. Wright & A. Miller, *Federal Practice and Procedure* (1973) 7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2032

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BERNARDO RIOS-PINEDA AND
ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. a. Respondents' defense of the decision below rests on an extremely restrictive, and erroneous, view of the Attorney General's discretion to rule on motions to reopen deportation proceedings. Respondents argue that the Attorney General may deny a motion to reopen in order to apply for suspension of deportation only "where it is apparent that the misconduct of the applicants will preclude their receiving the underlying relief requested" (Resp. Br. 6; see *id.* at 14-16). Respondents caution that it will not be possible to make that determination in most cases because "it is difficult to ascertain the degree of hardship without a hearing" (Resp. Br. 14; see also Pet. App. 8a n.3). Accordingly, "[w]here a case presents a fair issue of eligibility as a matter of discretion," respondents contend that the Attorney General should be required to grant the motion to reopen and hold a hearing on the availability of suspension relief (Resp. Br. 14).

The approach suggested by respondents is unduly restrictive even if one focuses exclusively on the appropriateness of granting suspension relief.[1] But its major defect is that it completely ignores the Attorney General's distinct discretion to deny motions to reopen for reasons independent of the merits of the underlying claim for relief. Respondents assert (Br. 14) that the authority to deny motions to reopen "is coextensive with the [suspension] statute itself"; thus, respondents would have the Attorney General apply the same standard to reviewing an application for suspension of deportation whether it is made in a timely fashion or in a motion to reopen long after deportation proceedings have concluded. This approach is seriously mistaken.

[1]Because respondents assert that hardship cannot be assessed without a hearing and suggest that only unusual (and undefined) circumstances would warrant denying relief if the statutory requirements for suspension are satisfied, it is clear that respondents believe that it will be the rare case in which the Attorney General would be justified in denying a motion to reopen on the ground that suspension relief will be denied. But this Court has recognized that such motions should not be granted as a matter of course. *INS* v. *Wang*, 450 U.S. 139, 143, 144 n.5 (1981). The regulatory requirement that the allegations in the motion to reopen, including those alleging hardship, be supported by affidavits is "designed to permit the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship." *Id.* at 143. While a hearing may be necessary in some cases to prove the *truth* of an alien's allegations of hardship, the affidavit requirement of 8 C.F.R. 3.8(a) forces the alien to detail his allegations in the motion to reopen. Thus, the Attorney General is quite capable of assessing the claimant's case from the face of the motion to reopen, without a hearing, and in many cases determining that discretionary relief is inappropriate even if the allegations of hardship are true. Indeed, given respondents' recognition (Resp. Br. 13) that the Attorney General has discretion to deny suspension relief to applicants who meet the threshold eligibility requirements, it is not apparent why his denial of respondents' motion to reopen should be invalidated even under the standard suggested by respondents.

As explained in our opening brief (at 34-36), there are strong reasons why the Attorney General should have wide latitude to deny motions to reopen deportation proceedings. See also *INS* v. *Wang*, 450 U.S. 139, 145 (1981). Therefore, it has been the Attorney General's "long-held position" that, even if the criteria for statutory eligibility have been satisfied, such motions "can be denied for purely discretionary reasons where a review of the record reflects either little likelihood of success on the merits or significant reasons for denying reopening based on the [alien's] actions." *In re Reyes*, 18 I. & N. Dec. 249, 254 (1982).

Respondents argue (Br. 15) that there is little authority supporting this power of the Attorney General to deny motions to reopen on an "independent basis * * * apart from the underlying relief sought." That contention is manifestly incorrect. This Court has recognized that the plain language of the regulation confers discretion on the Attorney General to decide when reopening is appropriate. *INS* v. *Wang*, 450 U.S. at 143-144 n.5; see also *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6. And, of course, because the Attorney General's own regulation is the only source for the availability of the reopening procedure, his interpretation of the scope of the procedural right created by that regulation is entitled to considerable deference (see Gov't Br. 18-19). Moreover, this Court has noted that an agency's decision not to rehear or reopen a matter already decided will be reversed only for "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946); see also *ICC* v. *City of Jersey City*, 322 U.S. 503, 514-515 (1944).[2] Thus, the

[2]Respondents' suggestion (Br. 16) that the Attorney General's exercise of discretion in denying their motion to reopen violated a due process right created by regulation is unsupportable. First, the cases cited by respondents involved sanctions for misbehavior that resulted in

interpretation of the regulation unsupported by any authority is that of respondents, which perversely requires the Attorney General to grant every motion to reopen unless he finds that the alien would not be entitled to the underlying relief.

b. The Attorney General reasonably exercised his discretion in this case in denying respondents' motion to reopen. In 1978, respondents were found deportable and ineligible for discretionary relief. They were not deported then only because they obtained an automatic stay of their deportation order by appealing it. 8 U.S.C. 1105a(a)(3); 8 C.F.R. 3.6(a). In 1982, respondents sought to reopen their deportation proceedings. Their motion did not suggest that new facts had come to light casting doubt on the correctness of the Attorney General's 1978 deportation decision. Rather, the only new circumstance was that, during the pendency of their appeals, respondents had satisfied the seven years' continuous presence prerequisite to applying for suspension of deportation.

The Attorney General was thus faced with a situation where it was apparent that respondents knew at the time of their deportation proceedings that they could in the future become eligible to apply for suspension of deportation if they could manage to delay their departure long enough. An examination of respondents' conduct showed that from the start their strategy had been to delay deportation as long

---

imprisonment; this case simply involves whether completed agency proceedings should be reopened on the basis of new evidence. More important, there is no defect alleged in the *procedure* used by the Attorney General in ruling on respondents' motion to reopen. The court of appeals' objection to the decision of the Attorney General is *substantive*; the court found that the reasons given for the decision were inadequate.

as possible (see Gov't Br. 31-32),[3] and, in particular, that respondents could not reasonably have thought that the appeals that had triggered the automatic stays had any likelihood of success; instead, the appeals served no purpose other than to delay their deportation.

In these circumstances, it would have been irrational for the Attorney General to exercise his discretion to reopen the deportation proceedings. The purpose of the automatic stay provisions is to prevent deportation that would effectively eliminate the alien's right to appellate review of alleged errors in his deportation proceedings; the provision plainly is not intended to give the alien an opportunity to accrue new equities and benefits through the passage of time when there was no error in the original deportation proceedings. As detailed in our opening brief (at 29-33), granting relief to respondents would encourage misuse of the stay provisions through plainly unmeritorious appeals by holding out the promise that such action would yield substantial dividends. Nor would there be any injustice in deporting respondents, since it is not seriously disputed that they were correctly found to be deportable in 1978; indeed, by the time they filed their motion to reopen, respondents had already obtained more than three years of additional unlawful residence in this country because of the liberal stay provisions. If the Attorney General's discretion to rule on motions to reopen means anything, that discretion was not abused here. See Gov't Br. 34-36.

---

[3]Even in this Court, respondents have continued to pursue this basic strategy. After the government filed its brief, respondents sought an indefinite extension of time to file their brief until the 99th Congress has an opportunity to act on immigration reform legislation that might conceivably include an amnesty program that would cover respondents. See Respondents' Motion to Continue Brief Filing Deadline (filed Feb. 9, 1985).

2. Respondents contend (Br. 19-24) that the Attorney General could not consider the unmeritorious nature of their appeals in denying the motion to reopen because those appeals were not "frivolous" within the meaning of *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421-422 (1978). This contention is flawed both in its underlying premise and in its assessment of the facts of this case.

a. Respondents characterize the decision to deny reopening as "an extraordinary sanction" that "deprive[s] [them] of their opportunity to present their suspension application to an Immigration Judge" (Resp. Br. 19). If this characterization were accurate, it might arguably be reasonable to look to the standard set forth in *Christiansburg*, which applies to the imposition of attorney's fees against plaintiffs for instituting frivolous Title VII litigation.[4] But respondents are not being "sanctioned" here. They had an opportunity to present their suspension application to an immigration judge at the appropriate time; it was denied because they were not eligible for relief. The Attorney General did not order respondents "deported * * * forthwith" (Resp. Br. 19) as a sanction for taking unmeritorious appeals; they were correctly ordered deported (back in 1978) because they were smuggled into this country in 1974 and have never lawfully been in the United States, and, in addition, were not entitled to any discretionary relief from deportation.

---

[4]Even if the Attorney General's decision were viewed as a type of sanction, the policy reasons that formed the basis for the imposition of a strict standard in *Christiansburg* are wholly absent here. Private suits are an important tool of Title VII enforcement, and Congress did not want to discourage such suits by making an attorney's fees recovery against a plaintiff readily available. See 434 U.S. at 418. Thus, the Court found that the attorney's fees provision, unless limited to frivolous or meritless litigation, "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII" (*id.* at 422). There is no corresponding congressional policy to encourage judicial review of administrative deportation orders.

The Attorney General relied on his assessment of the merit of respondents' appeals only in considering whether equitable considerations warranted a favorable exercise of discretion to reopen their completed deportation proceedings.

Therefore, the validity of the Attorney General's decision to deny reopening should not depend upon whether the appeals were "frivolous" or "meritless" within the meaning of *Christiansburg*. As detailed in our opening brief (at 17-19, 34-36), the motion to reopen procedure is designed to be invoked in a limited number of cases where new evidence or circumstances have arisen that would make execution of the existing deportation order unjust. The facts here, where the only basis for the motion to reopen was that stays pending plainly unmeritorious appeals enabled respondents to accrue the seven years of continuous presence needed to apply for suspension of deportation, makes this a particularly clear instance for denying reopening. But it surely cannot be the case that the Attorney General's discretion to deny a motion to reopen disappears completely if the grounds for appeal are slightly stronger than "frivolous." Given the substantial incentive for aliens to use the appellate process to delay deportation, the standard must be considerably higher. When an alien seeks to reopen his deportation proceedings solely because a stay pending appeal has enabled him to accrue sufficient years of presence to apply for suspension relief, it seems eminently reasonable for the Attorney General to exercise his discretion to deny the petition unless, at a minimum, the grounds for appeal were sufficiently plausible that pursuing the appeal was a reasonable course of action because of its substantive merit, not because of its value in delaying deportation.[5]

---

[5]The provisions granting automatic stays of deportation pending appeal to the BIA (8 C.F.R. 3.6(a)) and the court of appeals (8 U.S.C. 1105a(a)(3)) are extremely generous. Ordinarily, of course, a stay pending appeal requires a showing of probability of success on the merits. See 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904,

b. In any event, respondents' appeals were "frivolous" under any reasonable definition of that term. See generally Gov't Br. 23-27. Examination of the appeals "as a whole" (Resp. Br. 20) clearly shows that they were not reasonably calculated to achieve any purpose other than delay. Respondents do not dispute that most of the contentions raised in the appeals either lacked any conceivable legal basis or were plainly unsupported by the facts. Moreover, respondents made no attempt to support their contentions by authority or argument. Thus, the appeals could not reasonably have been expected to persuade the BIA or the court of appeals that the deportation order was erroneous; they did serve the purpose of triggering the automatic stays of deportation.

Even focusing on the one contention that respondents now claim (Resp. Br. 21-23) was not frivolous — the argument that respondents could not be deported because that would constitute an unconstitutional de facto deportation of their citizen children — there is no basis for finding that the appeals were not "frivolous" or "meritless" within the meaning of *Christiansburg*. This contention had been rejected by six circuits, including the Eighth (see Gov't Br. 24 n.13). Respondents' proffered distinction (Resp. Br. 21-22) of *Mendez* v. *Major*, 340 F.2d 128 (8th Cir. 1965), is unconvincing. The holding there was that Congress is entitled to set conditions governing the right of aliens to remain in this country and that aliens can be required to leave if they do not satisfy those conditions even if a citizen child would go with them. *Id.* at 131-132. This holding completely foreclosed respondents' contention. Indeed, the

---

at 316 (1973). The fact that the stay provisions of the immigration laws allow deportable aliens to prolong their unlawful presence in this country during the pendency of an appeal that has little chance of success hardly suggests that aliens should be entitled also to use that period to accrue new grounds to avoid deportation.

later case that respondents characterize (Resp. Br. 22) as finally deciding this issue actually found the claim unworthy of discussion; the court of appeals simply stated in one conclusory sentence that the claim was without merit, citing *Mendez*. See *Valadez-Salas* v. *INS*, 721 F.2d 251, 252 (8th Cir. 1983). Cf. *Hughes* v. *Rowe*, 449 U.S. 5, 15 n.13 (1980) (finding claim to be nonfrivolous and noting that seven-page opinion was written by district court in rejecting it). And even if respondents' distinction of *Mendez* had some merit, it was not argued to the court of appeals nor was any other effort made in respondents' brief to explain why the court should deviate from the established line of contrary authority. In short, respondents' appeals presented no basis on which the court of appeals reasonably could have found error in the deportation proceedings.[6]

3. With respect to the BIA's reliance on respondents' disregard of the immigration laws, respondents appear to argue (Resp. Br. 27) that the court of appeals made no broad pronouncement on whether that is a factor that may be considered. To the contrary, the court of appeals indisputably held that the BIA's reliance on Mr. Rios-Pineda's refusal to carry out an agreed-upon voluntary departure was " 'arbitrary, irrational, [and] contrary to the law' " because such conduct did not distinguish him from other

---

[6]The fact that a claim has not directly been rejected by this Court does not make it nonfrivolous, as respondents appear to suggest (Resp. Br. 22). It is to be expected that many frivolous claims will never reach this Court because they will be rejected uniformly by the courts of appeals. At the same time, we do not dispute respondents' contention (Resp. Br. 22-23) that a claim raised on appeal may be nonfrivolous even if it has been rejected by several courts of appeals. In such a situation, however, the Attorney General acts reasonably in treating the appeal as taken for purposes of delay unless the appellant at least addresses the contrary decisions and offers some explanation of why his position might conceivably be correct.

illegal aliens. Pet. App. 9a (citation omitted). For the reasons stated in our opening brief (at 36-39), we believe that this action, deceitfully taking advantage of a procedure intended to mitigate the harshness of deportation, was properly considered by the BIA as weighing against granting respondents' motion to reopen.

Respondents also erroneously contend (Br. 27-28) that the Board's reliance on this factor was based on material outside the record. However, the record unequivocally demonstrates that both respondents entered the country in 1974 with the assistance of a professional smuggler (Pet. App. 27a-28a; R. 96) and that in 1978 Mr. Rios-Pineda agreed to depart voluntarily, received an extension, and then simply failed to depart as agreed (Pet. App. 28a; R. 97-98).[7] Indeed, the record shows that Mr. Rios-Pineda initially stated to the immigration judge that he would not depart if the judge granted him voluntary departure (R. 98, 102); he recanted this statement after it was explained to him that the judge could not even consider voluntary departure unless respondent stated that he would in fact depart (R. 103-104).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

MARCH 1985

---

[7]Respondents are correct in noting (Br. 27) that the BIA's discussion of this point (see Pet. App. 15a) suggests that Mr. Rios-Pineda's deceit with respect to voluntary departure occurred in 1974. Given the record and the immigration judge's findings, however, it seems manifest that the BIA was in fact referring to Mr. Rios-Pineda's misconduct in 1978. Thus, the BIA did not rely on material outside the record.